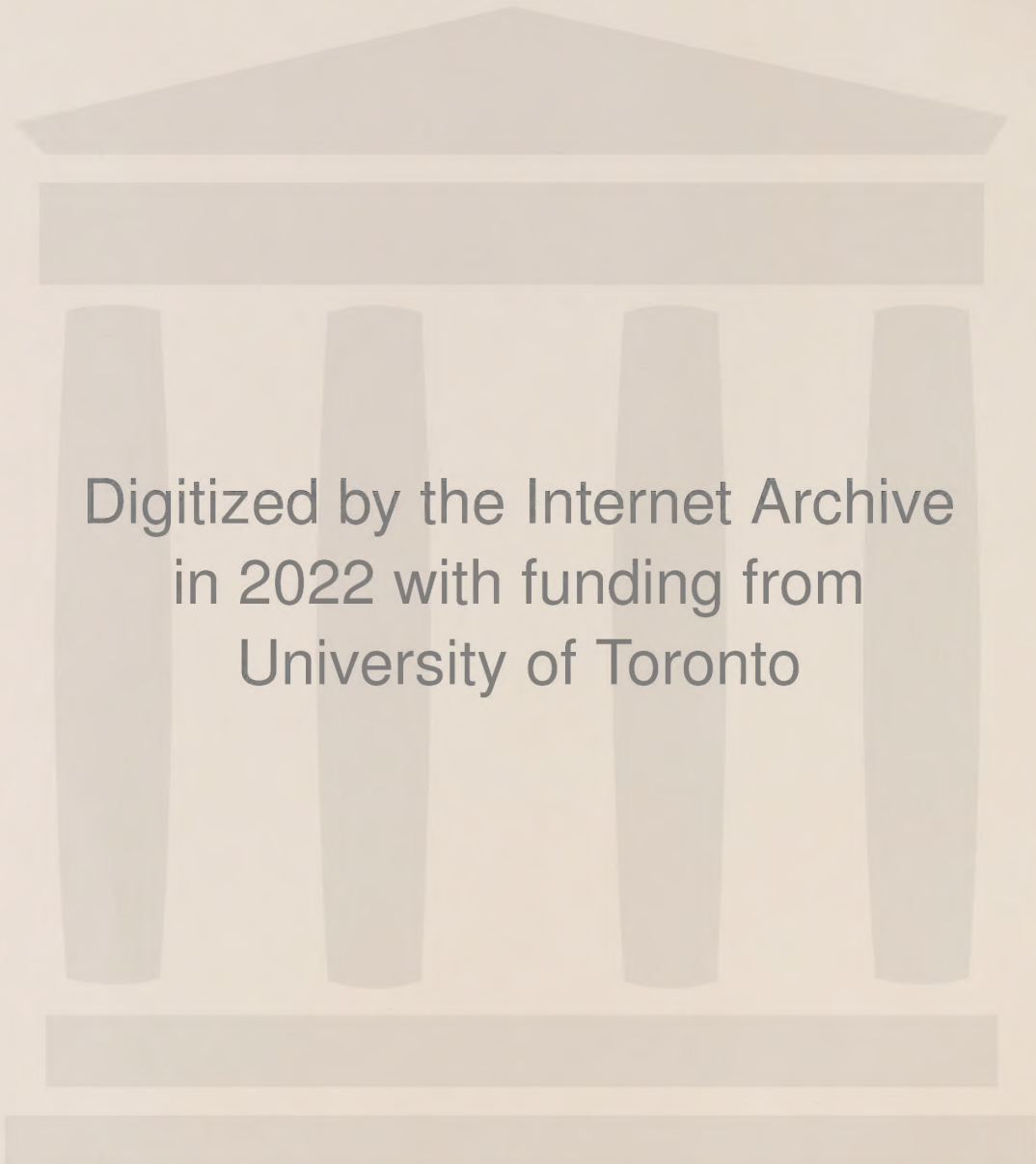
Sentencing - Deciding dangerousness: policy alternatives for dangerous offenders



Sentencing

DECIDING DANGEROUSNESS: POLICY ALTERNATIVES FOR DANGEROUS OFFENDERS

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DECIDING DANGEROUSNESS:

POLICY ALTERNATIVES FOR DANGEROUS OFFENDERS

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TABLE OF CONTENTS

ACKNOWLEDGEMENTS

This report was completed during the summer months of 1983 in response to a request from the Department of Justice, Canada, for a scholarly review of the scientific and legal literature bearing on the ability of mental health professionals to make reliable and valid predictions of the future violent behaviour of persons deemed to be Dangerous Offenders. All that was requested of us is this small-scale, short-run, project was a review of the pertinent published and unpublished literature. Yet as we began to read and write it soon became apparent that we needed to know more exactly what kind of views about these matters are currently held by prominent Canadian mental health specialists and lawyers. Accordingly, two of us (P.H. and C.D.W.) drew up an interview guide and set out to talk to forensic psychiatrists, psychologists, criminologists, nurses, academic lawyers, prosecutors, and members of the defense bar. The response was extremely gratifying. Our colleagues were eager to contribute and were very willing to donate their time to the project. We list below those persons who assisted us. This not only acknowledges their help as is proper, but it lets the reader know that, at least to a limited extent, our report is based not only on published work but also on the informed views of colleagues.

We are grateful to the following forensic psychiatrists for permitting themselves to be interviewed: Dr. Mark Ben-Aron, Clarke Institute of Psychiatry, Dr. Donald Braden, Regional Treatment Centre, Kingston Penitentiary, Dr. Derek Eaves, Forensic Psychiatric Services Commission of British Columbia, Dr. Russel Fleming, Penetanguishene Mental Health Centre, Dr. Luke Clancy, Regional Psychiatry Centre, Abbotsford, Dr. Stephen Hucker, Clarke Institute of Psychiatry, Dr. Frederick Jensen, METFORS, Clarke Institute of Psychiatry, Dr. Rodney Mahabir, METFORS, Clarke Institute of Psychiatry, Dr. N. Maley, Regional Treatment Centre, Kingston Penitentiary, Dr. Anthony Marcus, Department of Psychiatry, University of British Columbia, Dr. Robert McCaldon, Regional Treatment Centre, Kingston Penitentiary, Dr. Joseph Noone, Forensic Psychiatric Services Commission of British Columbia, Dr. Basil Orchard, Clarke Institute of Psychiatry, Dr. Myre Sim, Forensic Psychiatric Services Commission, Victoria, British Columbia, Dr. Edward Turner, METFORS, Clarke Institute of Psychiatry. Some psychiatrists who could not be interviewed kindly provided written comments. These were: Dr. Syed Akhtar, Nova Scotia Hospital, Dr. Lionel Beliveau, Institut Philippe Pinel de Montréal, Dr. John Bradford, Royal Ottawa Hospital, Dr. Brian Butler, private practice, Dr. Nazar Ladha, Memorial University, Dr. Selwyn Smith, Royal Ottawa Hospital, Dr. Douglas Wickware, University Hospital, London, Ontario.

The following psychologists were interviewed: Dr. Stephen Golding, Forensic Psychiatric Services Commission of British Columbia, Mr. Timothy Ho, Regional Treatment Centre, Kingston Penitentiary, Dr. Ronald Langevin, Clarke Institute of Psychiatry, Professor William Marshall, Department of Psychology, Queen's University, Dr. Vernon Quinsey, Penetanguishene Mental Health Centre, Dr. Marnie Rice, Penetanguishene Mental Health Centre, Professor Ronald Roesch, Department of Criminology, Simon Fraser University, Dr. Lana Stermac, METFORS, Clarke Institute of Psychiatry, Dr. Sharon Williams, Regional Treatment Centre, Kingston Penetentiary. Written comments were supplied by: Dr. Paul Gendreau, Ontario Ministry of

Correctional Services, and Dr. Stephen Wormith, Ministry of the Solicitor General, Canada.

Criminologists interviewed were: Professor Cyril Greenland, School of Social Work, McMaster University, Ms. Margaret Jackson, Department of Criminology, Simon Fraser University, Ms. Theresa Kerin, Corrections Branch, Ministry of the Attorney General of British Columbia, Mr. Robert Menzies, Department of Criminology, Simon Fraser University, Professor Hans Mohr, Osgoode Hall Law School, Professor Richard Ericson, Centre of Criminology, University of Toronto. Written remarks were given by: Ms. Diana Sepejak, Ontario Ministry of Correctional Services, and Dr. Michael Petrunik, Ministry of the Solicitor General, Canada. Two forensic psychiatric nurses were interviewed. They were: Ms. Sharon Hinkey, Regional Psychiatric Centre, Abbotsford, and Ms. Jan Miller, Regional Treatment Centre, Kingston Penitentiary.

The legal side was represented through interviews with several academic lawyers. They were: Professor Keith Jobson, Faculty of Law, University of Victoria, Professor Ronald Price, Faculty of Law, Queen's University, Professor Alan Mewett, Faculty of Law, University of Toronto, Professor Neil Boyd, Department of Criminology, Simon Fraser University, Professor Michael Jackson, Faculty of Law, University of British Columbia, and Professor John Edwards, Faculty of Law, University of Toronto. On the defense side we had interview contributions by: Ms. Jane Arnup of Greenspan, Arnup, Ms. Liz Goodwin of Penetanguishene Mental Health Centre, Mr. Leslie Morris, and Mr. Marc Rosenberg, Greenspan, Rosenberg. Written comments were kindly given by: Ms. Marlys Edwardh of Ruby and Edwardh, Mr. John Gignac of Hacker, Gignac, Rice, and Mr. Alan Gold. Several Crown Attornies gave help through interviews. The persons we talked to were: Mr. Alan Cooper, Judicial District of York, Ministry of the Attorney General, Ontario, Mr. Paul Culver, Judicial District of York, Ministry of the Attorney General, Ontario, and Mr. Alan Filmer, Q.C., Ministry of the Attorney General, British Columbia. Mr. William Wilson, Ministry of the Attorney General, Judicial district of Waterloo, completed the schedule for us.

The above list, though highly impressive, does of course remain very restricted. There are many other people in Canada who ideally should have been consulted. It is pointless to list their names. Sufficient to say that we were not in this consultation project attempting any kind of properly systematic analysis and that, given the constraints of time and money, could not have done so. Our sole purpose was, as already noted, to ensure that the report was not too academic or detached from the actualities of decision-making in courts, in penitentiary administrations, and in treatment units. One disappointment was that, aside from some very recent practical experience in clinical assessment and courtroom hearings with two cases (C.D.W), there was no opportunity during the study period to interview any inmates already deemed to be Dangerous Offenders. Fortunately, however, this gap may soon be filled by a project being conducted within the Ministry of the Solicitor General, Canada.

Our attempts to find out 'what is going on' within treatment units for sex offenders at Abbotsford and Kingston were greatly facilitated by the cordial receptions offered to one of us (CDW) by Dr. Pauline Lamothe of the Regional Psychiatric Centre in Abbotsford and by Mr. Tim Ho, Dr. W.

Miles, and M. Jean Guy Leger of the Regional Treatment Centre at Kingston Penitentiary. The staff in these institutions, recognizing the importance of Part XXI, were pleased to see us and to offer their views in candid and straightforward fashion. They deserve congratulations for struggling hard and cheerfully with what can only be described as a very difficult job.

Other people were very helpful to us with the more strictly scholarly and general administrative aspects of the project. Dr. Vernon Quinsey, Penetanguishene Mental Health Centre, advised us on the construction of the interview schedule and suggested references on the treatment of sex offenders. Dr. Michael Petrunik, Ministry of the Solicitor General, supplied us with his lengthy and scholarly unpublished reports on Dangerous Offender legislation. He also corrected some of our drafts. Dr. Ronald Langevin made detailed criticisms of Section 2:6 in Chapter 2 (on the assessment and treatment of serious sex offenders). The Ministry of the Solicitor General, was of great assistance in supplying information about the current status of Dangerous Offenders in Canada (Section 2:5). Mr. Douglas MacKay kindly put at our disposal his recently completed M.A. dissertation in Criminology, the completion of which was greatly facilitated by Mr. Peter Rickaby, Q.C., and colleagues within the Ministry of the Attorney General, Ontario. Professor Cyril Greenland, McMaster University, Dr. Stephen Hucker, Clarke Institute of Psychiatry, Dr. Vernon Quinsey, Penetanguishene Mental Health Centre, and Dr. Edward Turner, METFORS, Clarke Institute of Psychiatry, read the manuscript for us. They offered helpful comments and suggested many references. The same kind service was performed by Mr. Jack MacDonald and Mr. David Solberg of the Department of Justice, Canada. The authors do, however, remain responsible for any errors of fact or interpretation.

The fact that the project got organized so quickly and efficiently is due to Mr. Jack MacDonald and Mr. David Solberg and to Professor Anthony Doob, Director of the Centre of Criminology. We are particularly grateful to Tony Doob for taking charge of the administration of the grant and to Elizabeth Burgess for handling the accounts so efficiently. Parts of the manuscript were typed in draft by Mrs. Kim Yoshiki of METFORS, Clarke Institute of Psychiatry, and the entire report was typed very efficiently and attractively for us by Mrs. Marie Pearce of the Centre.

Our thinking for the report has been appreciably guided by previous research and educational endeavours. We should be remiss were we not to acknowledge the help of the Department of Justice, Canada, the Ministry of Health, Ontario, the Clarke Institute of Psychiatry Educational Fund, the METFORS Fund, the Canadian Psychiatric Research Foundation and the Centre of Criminology, University of Toronto. Although the full explicit costs of the research were covered by the Department of Justice, Canada, various related services of the Centre of Criminology supported in part by the Contributions Program of the Ministry of the Solicitor General, Canada, also aided with the work. The Canadian Psychiatric Research Foundation provided some of the travel funds which made possible the 'ad hoc consultation' study mentioned in this report. As well, we acknowledge with thanks the help of the Ministry of the Attorney General, Ontario, for providing financial support to two of our contributors during the summer of 1983. Another of our contributors was supported through a summer research assistantship provided by the Faculty of Law, University of Toronto.

SUMMARY

There is little evidence to suggest that psychiatrists or other mental health experts can predict the future dangerous conduct of patients or prisoners with any substantial degree of certainty. This statement holds true for predictions based on either clinical opinion or psychometric testing. Earlier findings which suggested that mental health workers overpredict violent behaviour have recently been confirmed, several times. Although these studies contain major methodological flaws, mostly unavoidable, the evidence taken as a whole does not inspire confidence in these particular kinds of psychiatric and psychological judgments. It has been suggested that clinical judgments may be sound in the short run when the clinical assessor has a good knowledge of the individual's present and immediate future physical and social circumstances, but there is scant evidence even for this assertion. It appears that mental health workers do not demonstrably possess the ability to forecast the likelihood of violent conduct of persons over a span of several years. Special doubt about clinical predictive ability may apply when the prisoners under assessment do not apparently suffer from serious psychiatric disorders. An ad hoc interivew study based on the opinions of some 40 Canadian forensic psychiatrists, forensic psychologists, and criminologists showed that these professionals themselves would claim little ability to predict the future violent behaviour of Dangerous Offenders of the kind dealt with under Part XXI of the Criminal Code of Canada.

Very generally, the professionals, most of whom qualify as experts in Part XXI hearings, had an impressive knowledge of the recent literature on the prediction of violent behaviour. They were well acquainted with the striking methodological difficulties involved in conducting research on this topic (e.g., it is hard to predict behaviours with low base-rates; predictions cannot be properly tested without the release of at least some persons believed to be violent; many post-incarceration offences are not registered, etc.), and they appeared to have an awareness of the many kinds of clinical prediction errors now known to be possible (e.g., confusion of confidence with accuracy; reliance on illusory correlations; overemphasis on trait characteristics of the individual at the expense of thorough and detailed analyses of the physical and social environments in which the violent behaviour occurs, etc.).

Predicting violence at the level of the individual prisoner is practically impossible without an almost inconceivable degree of control over key environmental, treatment, and biomedical variables. It is imperative to recognize that the most any clinician or researcher can ever offer is a probability estimate of future violent behaviour. Some of the most promising recent research in the United States and Canada involves 'risk assessment'. This approach accepts as a basic premise that probabilistic statements are the most that can be expected and attempts, often with fair success, to demonstrate the predictive power of particular easily-obtained pieces of information. Such variables are age, number of previous convictions, amount of force used in the commission of the crime, etc. It is likely, particularly with a 'non clinical' criminal population, that such predictions would be more, not less accurate than clinical predictions. Unfortunately, principles derived from this seemingly detached, 'rationalized', approach to decision-making are

unlikely to appeal to the members of the public who mistakenly believe that a maximum degree of personal protection is achieved through the court-regulated application of the more or less intuitive judgments of mental health and criminological specialists.

Whatever the ins and outs of the long-standing clinical versus actuarial debate within psychology and psychiatry, it is highly unlikely that the issues are going to be settled through deliberate experimentation upon the group of persons currently confined as Dangerous Offenders. Indeed, in Dangerous Offender hearings the judge is in the position of trying to decide whether or not society has already 'experimented' enough with the individual who appears before him or her. This means that the only allowable research possible is historical and descriptive. One such descriptive study (D. MacKay, Centre of Criminology) of the 27 hearings in Ontario between 1977 and May 1983, has shown that 21 men were declared Dangerous Offenders during the study period. The bulk had previously been convicted of sex crimes. Florid psychiatric disorders seemed to be absent for the most part in this sample which, by and large, easily met the Part XXI criteria. They were mainly repeat offenders, though a few qualified under the "such a brutal nature" clause. Although firm evidence on the point is lacking, it seems that the prior existence of positive psychiatric opinion regarding 'dangerousness' is a key element in the advancement of an application for Dangerous Offender status. That is, when considering psychiatric influence in the context of Part XXI, it is well to remember that the vital influence may occur not so much at the hearing itself, but during the prosecutorial preparation of the case.

Case data made available to us by the Ministry of the Solicitor General show that between 1977 and 1983 a total of 32 men have been declared Dangerous Offenders in Canada. This group includes the MacKay sample (which accounts for about two-thirds of it). Some provinces, including Quebec, have made no use of the provisions since the 1977 modifications. This uneven application of Part XXI across the country warrants close study. When data from the whole of Canada are considered, there appears to be a gradual increase in the use of Part XXI over time. So far no prisoner sentenced under this statute has been released from custody. Two other recent studies have shown that some individuals detained indefinitely under the pre-1977 regulations as Habitual Criminals (M. Jackson of the University of British Columbia) and Dangerous Sexual Offenders (C. Greenland of McMaster University) have had difficulty in securing release. We cannot but wonder if similar difficulties will not eventually arise with respect to the present Part XXI Dangerous Offenders and if, despite the guarantees in law of frequent review by the National Parole Board, an additional mechanism will not ultimately prove necessary. Although this is speculative, it is likely that history will be repeated.

Since most present Dangerous Offenders were convicted of sexual offences, it is natural to ask whether or not at least some of these individuals might be helped to achieve reasonably early release as a result of strenuous attempts at rehabilitation. The pertinent literature suggests, however, that in recent years the exciting scientific advances have been more in the area of assessment of sexual anomalies than in the treatment of them. Although several fairly promising therapeutic options are now available for dealing with certain specific serious sexual adjustment difficulties, there is at the same time an increasing

recognition that the men require help in many other areas of living. Most researchers who work in this field, while remaining guardedly optimistic about the positive effects of their programmes, are quick to point out that convincing scientific evidence for the effectiveness of treatment interventions with severely sexually assaultive males is scant. Case studies abound and there are plenty of uncritical descriptive reports; but rigorous controlled work is at a premium. This is especially true in the case of penitentiary-confined inmates for whom it is almost impossible to subject the results of therapy to hard test in the natural social environment. The treatment of persons placed under indeterminate sentences poses even more striking problems. Since with some reason the inmates come to view release as being almost beyond the bounds of possibility, they are inclined to have little motivation for treatment. Yet, without some concrete evidence of change of the type which can occur and be documented in therapy, a man has little chance of convincing the National Parole Board of the fact that he is ready for release under supervision. The present penitentiary treatment programmes for sexual and assaultive offenders are up against very big odds, given the limited human and physical resources presently available to them. Even if they work, which they likely may to some degree, there is a marked lack of the kinds of research resources necessary to record the successes and to capitalize on whatever gains are being made.

Beyond the already-noted difficulties presented by the recent literature on the prediction of future violent behaviour, there are several legal issues which arise with respect to Part XXI proceedings. The potential exists for the imposition of a far more severe sentence under Part XXI provisions than would otherwise be possible under other sections of the Criminal Code. The major legal obstacle to the imposition of an indeterminate sentence is the reliance in a Part XXI proceeding upon the predictive 'evidence' of psychiatrists and other experts, whose expertise in such matters currently faces vigorous challenge.

Indeed, an authorative voice for the scientific community with most relevance to the prediction of dangerousness, the psychiatric community, has suggested publicly and officially that the present state of predictive competence is so primitive that it remains functionally unreliable and frequently inaccurate. In a 1976 case in the Supreme Court of the state of California (Tarasoff) and in several subsequent cases, the American Psychiatric Association (APA) submitted amicus curiae briefs claiming that mental health professionals are not presently competent to make reliable and accurate clinical predictions of violence and that, consistently, such professionals tend to overpredict dangerous behaviour.

The implications of such a disclaimer for the continuing role of expert witnesses in Dangerous Offender hearings would appear to be significant. The American experience, however, suggests otherwise. In a decision rendered in July, 1983, in a case involving the use of psychiatric testimony in the prediction of long-term dangerousness (Barefoot), the United States Supreme Court rejected the advice of the APA brief, which had argued that psychiatrists should not be allowed to give evidence of an accused's future dangerousness in capital sentencing cases. To bar psychiatric predictions of this sort, the Court suggested in the majority opinion, "would be somewhat like asking us to disinvent the wheel".

In spite of this judicial reluctance to exclude psychiatric and related expert testimony from ordinary and capital sentencing hearings, some American courts have ruled that the "calculus of risk" in capital sentencing cases tips the balancing process in favour of accused persons. Where the possibility of execution is not an issue, the Supreme Court of California concluded that it is possible to balance "uncertain and conjectural harm" to future victims with the risk of some term of incarceration for the offender, and act on the basis of the scientific prediction (Murtishaw). In capital sentencing cases, however, where accused persons face not merely incarceration but execution, the court suggested that the certainty of harm which would be done to the offender, render potentially unreliable psychiatric predictions of future violence extremely prejudicial. There is as yet no indication that American courts will apply this kind of reasoning to contexts other than capital sentencing hearings.

In the Canadian context, courts have tended to assess predictions of future behaviour on their individual merits and, in some cases, to let the problem of the unreliability of psychiatric predictions be construed as an issue of weight rather than admissibility of evidence. A recent Dangerous Offender proceeding in Ontario (Morrison) heard extended evidence as to the unreliability and inaccuracy of psychiatric predictions of future dangerousness. Mossop, J.A., in what was clearly a most difficult judgment, found the defendant to be a Dangerous Offender within the meaning of Part XXI. While admitting the "recognized perils of forecasting future conduct" he nonetheless thought that "[o]n this issue, the courts really have nowhere to turn except to those who have expertise in the field of psychiatry..."

A final issue to be considered within the scope of the legal context is the possible implications of the Canadian Charter of Rights and Freedoms for Part XXI proceedings and the principle of indeterminate detention. Although it is too early to determine how aggressively Canadian courts will employ the new constitutional process to protect individuals' rights, several influential decisions appear to take the view that the Charter does not represent a departure from or a displacement of what has been characterized as "a fairly efficient and reasonable system of criminal law" (Manitoba Court of Appeal in Belton). Charter challenges to preventive detention are raised by the legal rights guaranteed in section 7 (the right to fundamental justice), s.9 (freedom from arbitrary detention), s.11 (f) (the right to a jury trial), and s.12 (freedom from cruel and unusual punishment), and equality rights guaranteed in s.15 (but not in force until April, 1985). With the exception of the right to a jury trial each provision has an analogue in the Bill of Rights.

Citing an "unbroken continuity of legislative intent respecting the protection of the public" (N.W.T.S.C. in Simon (No. 3)), Canadian courts have turned aside most challenges under the Charter to Part XXI in principle and in practice, relying on Bill of Rights case law. In cases under the Charter where an accused has argued that indeterminate detention constitutes cruel and unusual punishment, the courts have focused on the validity of legislative objectives rather than on the means used to achieve those objectives, or the impact on the recipient of that punishment. Equality rights, although more broadly articulated under the

Charter than under the Bill of Rights, are likely to be equally narrowly construed. In short, protecting the public from "reasonably foreseeable dangers" remains a valid and reasonable legislative goal, and the recent introduction of the Charter would appear to have relatively little impact on Part XXI proceedings.

Accordingly, the first policy issue to be addressed must be that of detention of offenders perceived to be dangerous not for their care or rehabilitation, but for the protection of the public. A balance must be struck between duties to the public and responsibilities to individual offenders.

Therefore, Dangerous Offenders should be reliably and consistently identified, and be subject to incarceration which addresses both society's right to security and the liberty of offenders who have been detained for as long as others who have offended comparably. Initial reform of Part XXI therefore requires clarification of language describing Dangerous Offenders, and reduction of the special labelling of sexually dangerous offenders, since the label is harmful to their personal safety in the penitentiary setting and may be of no diagnostic or prognostic significance.

The inherent unreliability of psychiatrists' and other mental health professionals' predictions of long-term dangerousness in individual cases may be addressed through a number of options. One is to regard dangerousness in the same way the law regards insanity, that is, as a matter of fact determined by a jury according to legal instruction given by a judge and its own observation guided but not governed by psychiatric and other relevant evidence. This technique currently accounts for indeterminate detention of those not guilty by reason of insanity, and may be no less appropriate to commit to indeterminate detention those guilty by reason of dangerousness. This may not reduce psychiatric unreliability, but may mitigate it through the full conduct of adversarial scrutiny before a jury.

Judges acting alone may furnish an alternative option, by replacing parole boards in conducting hearings for the release of Dangerous Offenders. Judges are expected to be no less sensitive than parole boards to the public's need for protection while having at the same time the individual's liberty rights at heart. As well, they can receive the opinions of experts within the correctional system while reserving the right to decide precisely the extent to which their decisions should rely on such information. This option may interact with a further proposal that review be more frequent, perhaps after an initial sentence has been served. No post-1977 Dangerous Offender has yet been released, but it is accepted that an eight or nine year term is an expected minimum requirement. After, say, seven years, there might be a right to review every year, instead of review as at present every other year after an initial review once within the first three years of detention. Removing entitlement to reviews which are in any event illusory, and placing detaining authorities under growing pressure to justify long terms of detention may create a more acceptable balance between public security and individual liberty.

Regarding psychiatric and comparable evidence on dangerousness, an

option exists which is dramatically the reverse of the present requirement that two psychiatric witnesses are obligatory. Such witnesses could be prohibited from testifying as to future dangerousness. The American Psychiatric Association has recently urged this preference before the U.S. Supreme Court, but without success. Alternatives are to reduce adversarial dispute over psychiatric expertise and clinical testimony by having one or more psychiatrists sit as assessors, with or without the judge, to determine dangerousness. While this might spare professional embarrassment, however, it would do nothing to improve reliability of assessment. Such options may be less favourable than that of permitting parties to call such evidence if they wish, but to let it serve as little more than evidence of possible future character.

Beyond options on procedures to determine dangerousness are options on management of those found to have this status. An initial alternative to indeterminate sentence is extended determinate sentence. Enactment of liability to extended sentences for repeat offenders might reinforce incentives against recidivism. This would not accommodate dangerous first offenders, of course, but few first offenders are subject to Dangerous Offender applications, since past record is most influential in the making and success of such applications. Extended determinate sentence might set a more acceptable balance than indeterminate detention between the public's right to be protected, and the offender's right in time to be free.

This option may be preferable to the variant of imposing an added term of determinate detention to whatever term is imposable for a proven Dangerous Offender's last offence. This presents the difficulty that the offence attracting the added term may be relatively trivial, although it may be a more acceptable option on condition that the offence to which the added term is attached be a serious offence or result from clearly dangerous conduct. This may introduce a potential, however, for unsavoury plea bargaining upon a later charge.

A further option is to permit a Dangerous Offender's trial, sentence, and incarceration to run a routine course, but to present a Dangerous Offender application when the defendant would otherwise be released in order to justify further detention. This affords special sanctions for those who persist in violent or menacing behaviour while in prison. It remains contentious, however, whether such an instrument is necessary or desirable, since misconduct while in detention can be processed as a matter of prison discipline or be subject to regular criminal proceedings. The Law Reform Commission of Canada has disfavoured this option, but it may be worthy of further consideration where an offender's dangerous potential over the short term or to a specific likely victim becomes apparent or aggravated during incarceration.

A combination of proposed options is a determinate extended sentence added to that justified by the last offence after which the Crown would be able to seek further periodic detention, but against the background that the offender has served his due sentence and is entitled in principle to be free. This may be applied in favour of an offender in the knowledge that the potential for dangerousness declines with advancing age. If this has the advantages of the options it incorporates, however, it may bear their disadvantages too.

The final option is the most radical and the most obvious. This is simply to repeal Part XXI and leave management of offenders who may be dangerous to the regular sentencing process. Experience shows that very few offenders indeed are designated as Dangerous Offenders who could not otherwise be kept in incarceration for considerable periods of time. In so far as dangerousness can be reliably shown, the Crown may introduce such evidence on the issue of sentence, without leave of the provincial Attorney-General, in order to induce the judge to move individual sentence up to the maximum allowed by law for the convicted offence or to impose consecutive rather than concurrent sentences for different charges in an indictment. About half of the present Dangerous Offenders could have been given life sentences for the offence which prompted the hearing. The remainder would now be facing maximum terms of at least ten years. It may be remembered that non-offenders may be involuntarily detained under provincial mental health legislation if they are shown to constitute a danger to others and to be suffering from mental illness. This detention is indeterminate, but subject to periodic review and undertaken in a non-penal context even when a suspect is held in close security. This may provide an appropriate setting for detention after penal incarceration of those who can be shown dangerous due to mental illness. This re-opens the issue, however, of treatability, and raises questions of abuse of mental health assessment and, crudely expressed, of the relation of the bad to the mad.

The urge to protect the public against dangerous people is laudable. The question to be addressed is whether present knowledge allows this end to be achieved compatibly with just treatment of offenders. To tolerate their additional punishment on account of the crimes they are anticipated likely to commit is oppressive in obvious ways, unless the likelihood of offending is very compelling. Where it is, additional detention may spare injury to their likely victims, and spare them the consequences of further offending. Accepting less than perfect knowledge, a worthy task is to improve reliability and accuracy of prediction, improve consistency of treatment among comparable offenders, and maintain sensitive monitoring of the balance between reasonable (not complete) protection of the public, and the reasonable expectations of persons reliably considered dangerous eventually to be free.

.... And now the boy was being tried as a dangerous character against whom society must be protected.

'Just as dangerous a creature as yesterday's criminal', thought Nekhlyudov, listening to all that was going on. 'They are dangerous - but aren't we dangerous? ... I am a rake, a fornicator, a liar - and all of us, all those who know me for what I am, not only do not despise me but respect me. But even supposing this lad were more dangerous to society than anyone in this room what in common sense ought to be done when he gets caught?'...

'We rear not one but millions of such people, and then arrest one and imagine we have done something, protected ourselves, and nothing more can be required of us, now we have transported him from Moscow to Irkutsk...' from Tolstoy (1828-1910) Resurrection, Penguin edition, 1966, pp. 165-166.

CHAPTER 1

SCOPE OF THE REPORT AND GENERAL INTRODUCTION

> But can mental health professionals genuinely improve the rationality of sentencing decisions? More specifically, can they determine any better than can judges when confinement is necessary to rehabilitate, or at least deter, particular offenders?; and, if so, can they determine how long such confinement need be? Can they determine - again, any better than judges can without their help - which offenders need to be confined to protect the community and, if so, for how long? These are the hard questions that must be answered before a thoughtful sentence can be imposed.[1]

1:1 Scope of the Report

The Criminal Code of Canada, Part XXI,[2] would seem to be based on the presumption that psychiatrists, psychologists, and criminologists are indeed able to improve the rationality of judicial sentencing decisions. It is mandatory under Part XXI that two psychiatrists provide expert testimony and it allows participation in Dangerous Offender hearings by psychologists and criminologists.[3] Since the present provisions came into effect in 1977 some six years ago a great deal has been published on the scientific prediction of violent behaviour. This interest has been quickened by highly influential legal rulings, Tarasoff particularly.[4] It is indeed fair to say that interest in the clinical prediction of dangerousness, not a major issue until the highly influential 'Operation Baxstrom' study by Steadman and Cocozza[5] and the publication of powerful critical reviews like those of Ennis and Litwack,[6] has in recent years become a matter of major importance in forensic psychiatry and criminal law. Now that Part XXI is securely established in the Code and now that Canadian courts have had some considerable experience with it, it is time that a review be undertaken. That is the purpose of this report.

With so much having been written on the prediction of violent behaviour during the past few years, the reader might wonder why yet another report is needed. It might be thought that perhaps this will be the last report, the definitive one. But this can hardly be the case. Reports on Dangerous Offender legislation in Canada have been called for in the past[7] and more of them will be demanded in the future. Dangerous Offenders, most of whom as we shall show are presently convicted for sexual crimes, are a "residual" problem for any correctional/rehabilitation programme.[8] Not only are the offenders hard to treat or reform in prison[9] but, under certain circumstances, it is even difficult to guarantee their physical survival in custody.[10] Depending upon prevailing economic and political considerations, there is, in some decades, a pervading and unfounded optimism about treatability;[11] in others as at present a generalized and perhaps unwarranted pessimism.[12] These overall patterns of clinical practice in the helping professions are themselves much influenced by legal decisions.[13] These legal rulings not only alter almost continuously the powers of psychiatry and related

professions but also affect the professional confidence of individual practitioners. And then there is too the fact that public opinion about the sex offender, though generally running strongly against him,[14] varies in its intensity. That intensity depends to a large degree on the occurrence or otherwise of sensational or sensationalized sex crimes.[15] These events simply occur; they cannot be controlled.

There is as well the point that the enactment and modification of laws other than those affecting the Dangerous Offender specifically, have effects, sometimes unanticipated, upon provisions such as those contained in the present Part XXI. The introduction of the Charter of Rights and Freedoms may eventually affect interpretations of the Dangerous Offender legislation in some ways. We guess at these in Chapter 3 (section 3:5) of the present report. Were the Canada Evidence Act to be amended to permit the wider admission of testimony of children under 14, it seems certain that this would affect, at least indirectly, the outcome of trials involving serious sexual offences against children.[16] There is also the point that the entire force of Part XXI would be radically altered through changes in general criminal sentencing provisions. A stiffening of penalties for serious personal injury offences might make the present Part XXI provisions seem mild by comparison;[17] a relaxation of sentencing power might make them seem more rigorous than currently. For these and other reasons, we suggest that no definitive solution is possible to the issues we raise in this report which, we confess, has nothing of the stature of those Canadian reports already noted. We content ourselves with looking carefully at the recent published scientific and legal findings and putting forward such suggestions as seem reasonable to us at this time.[18]

1:2 The Current Dangerous Offender Provisions: General Background

In 1947 the Canadian parliament enacted the Habitual Criminal and in 1948 the Criminal Sexual Psychopath legislation. The key element in both pieces of law was the introduction of indefinite detention. During the period 1947-1977 the legislation was altered in various ways partly as a result of the work of the McRuer and Ouimet reports. In 1978 the notion of Habitual Criminals was dropped altogether since it appeared that the law had been applied more against nuisance offenders than seriously dangerous persons. With these changes the term Dangerous Sexual Offender was dropped and despite considerable study and some contrary advice,[19] a new category, 'Dangerous Offender', was established. The 1977 legislation, which also contained provisions for the continuing review of the 'old' Habitual Criminals and Dangerous Sexual Offenders (see Chapter 3, section 3:1), has not been altered since 1977. One of the purposes of the present review, as already noted, is to try to cast some light on the operation of Part XXI over the past six years.

Several authorities have reviewed the historical background of the present law[20] and, as will become clear in Chapter 3, a good deal has been written about it. For the purposes of Chapter 2, however, it is only necessary to note that the provisions are intended to be used against offenders who have been convicted of a serious personal injury offence and who "constitute a threat to the life, safety or physical or mental well-

being of other persons"[21] because of evidence establishing "a pattern of repetitive behaviour by the offender" who has shown a "failure to restrain his behaviour" and therefore might be especially capable of causing "death or injury to other persons, or inflicting severe psychological damage upon other persons".[22] Elsewhere Part XXI points to the need to establish "a pattern of persistent aggressive behaviour by the offender" and for establishing that he showed "a substantial degree of indifference...as to the reasonably forseeable consequences to other persons of his behaviour."[23] It is to be noted that in the provisions just outlined it is necessary that the offence for which the person has already been convicted must form a part of the pattern of persistent or repetitive behaviour. But another subsection allows the provisions to be applied to an individual who, although not necessarily a repeat offender, has been found guilty of an offence "of such a brutal nature as to compel the conclusion that his behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint."[24] What we have described so far applies to dangerous behaviour generally. However Part XXI deals specifically with sex offenders in allowing the provisions to be applied against an offender who, "by his conduct in any sexual matter including that involved in the commission of the offence for which he has been convicted, has shown a failure to control his sexual impulses and a likelihood of his causing injury, pain or other evil to other persons through failure in the future to control his sexual impulses."[25]

The application for a hearing must be endorsed by the Attorney General[26] and it takes place before a judge sitting alone.[27] A key aspect of the proceedings involves psychiatric testimony. This is not an option but is required. The stipulation is as follows:

(1) On the hearing of an application under the Part, the court shall hear the evidence of at least two psychiatrists and all other evidence that, in its opinion, is relevant, including the evidence of any psychologist or criminologist called as a witness by the prosecution or the offender.

(2) One of the psychiatrists referred to in subsection (1) shall be nominated by the prosecution and one shall be nominated by the offender.[28]

A final point of note at this stage has to do with parole review. Part XXI requires that a parole review be undertaken after three years of custody and no later than every two years thereafter.[29] And, as already mentioned, provisions were introduced to deal with pre-1977 Habitual Criminals and Dangerous Sexual Offenders. Such cases are to be reviewed at least annually.[30] A certain amount is known about what happened to the 'old' Dangerous Sexual Offenders[31] and the 'old' Habitual Offenders.[32] This matter is discussed briefly in Chapter 2 (section 2:5) where we also outline the characteristics of the 'new' post-1977 Dangerous Offenders.

Many readers will, of course, be familiar with the provisions under consideration here. Those who wish more detail will find it in Chapter 3 (section 3:1) where we deal with the legal intricacies. For the purposes of the following chapter, however, it is only necessary to have a general grasp of the kinds of predictions required by psychiatrists, psychologists, and criminologists under Part XXI. As well, it is helpful

to know how the decision-making process is supposed to work on paper. Only then can we begin to consider how it might work in practice.[33] Our view is that the decision-making process itself must be an object of scientific scrutiny as it is carried out by individual practitioners themselves, as it performed in a clinical team among colleagues, and as it is played out in court.

1:3 What Part XXI Demands of the Clinician or Criminologist

The reader will note that the prediction task requires the clinician to offer a forecast of future dangerous behaviour over the long term. As is clear from the provisions summarized above, the individual has at the time of hearing already been convicted of a serious offence so, whether or not the application under Part XXI is successful, an extended period of imprisonment is certain. The person will not usually be eligible for release from a penitentiary for at least a few years. Thus the clinical prediction made at the time of the hearing is expected to hold up over a very long time.

It will be evident that the provisions make no mention of the kinds of treatment, if any, to be made available to the convicted person upon being deemed a Dangerous Offender. The clinician is called upon to predict without being given information about the precise prison confinement/treatment conditions. At a common sense level it would seem that predicting without such knowledge is a difficult, almost foolhardy, venture.[34]

A close reading of Part XXI shows there is no mention of mental disorder in the convicted person. The accused has already been deemed fit to stand trial and, presumably, a Section 16 (insanity) defence has either not been considered or has been ruled out. Moreover, individuals proceeded against under Part XXI are not usually civilly detainable under the appropriate provincial mental health legislation. Most offenders can therefore be safely assumed free of the grossest kinds of insanity. This self-evident observation becomes important later in this report.

A final point worth noting is that the Part XXI provisions cast the experts into adversarial roles. That is, the hearing is based on procedures fundamental to the operation of criminal law. Although this is no place to question that time-honoured tradition or the methods which flow from it, it is worth pondering whether or not this approach is ideal for the shaping of scientific or 'psychiatric truth'.[35] Present practice may indicate that being a Dangerous Offender, like being insane under s. 16, is to achieve a legal status rather than a psychiatric status.[36]

These very general considerations are important as we proceed to the next chapter where, after offering a few very fundamental points about the nature of research design, we examine briefly a series of recent studies on the prediction of dangerous behaviour. We then offer some suggestions as to how clinical and actuarial predictive accuracy could be improved at least to some slight degree. Next we examine some recent thinking by researchers and practitioners as it bears on the Part XXI-type prediction problem. We then consider briefly the present state of knowledge

regarding the treatment prospects for the sorts of serious sex offenders who fall under the provisions central to this report. In a final section we give some of the main findings from an ad hoc interview project carried out specifically for the purposes of the present report. That study enabled us to gather opinions from psychiatrists, psychologists, criminologists, and lawyers knowledgeable about Part XXI and the issues associated with it.

Chapter 1: Footnotes

1. Litwack, "The Insanity Defence, the Mentally Disturbed Offender, and Sentencing Discretion", in Wright, Bahn and Rieber (eds.) Forensic Psychology and Psychiatry, (New York: New York Academy of Sciences, 1980) at 195.

2. R.S.C. 1970 C-34, ss.687-695.

3. Ibid., s. 690.

4. This ruling has been considered in detail by one of us (BMD) elsewhere. See "Prediction, Professionalism and Public Policy" in Webster, Ben-Aron and Hucker (eds.), Probability and Prediction: Psychiatry and Public Policy, (New York: Cambridge University Press, in press). It is also treated in the present report. See section 3:3 infra.

5. See Steadman and Cocozza, Careers of the Criminally Insane: Excessive Control of Social Deviance, (Lexington, Mass.: D.C. Heath, 1974).

6. Ennis and Litwack. "Psychiatry and the Presumption of Innocence: Flipping Coins in the Courtroom", 62 Calif. L.R. 693 (1974).

7. Hon. Mr. Justice J.C. McRuer, Report of the Royal Commission on the Criminal Law Relating to Criminal Sexual Psychopathy, (Ottawa: Queen's Printer, 1958). Hon. Mr. Justice R. Ouimet, Report of the Canadian Committee on Corrections: Toward Unity: Criminal Justice and Corrections, (Ottawa: Information Canada, 1969).

8. The actual position of the sex offender in the Canadian penitentiary system has been made clear by Marcus. He reminds us that (at 29): "As things stand in the penitentiary and other correctional institutions, there is no crossing the caste barrier for the sex offender.... The sex offenders report that they expect the prison staff to treat them as garbage, reflecting the viewpoint of most people in society - and usually find their expectations fulfilled. They expect the social worker, psychiatrist and other professionals to deal with them as something less than other men, and sense in these people a clinical detachment which ignores the sex offender's feelings and limits involvement to a diagnostic labelling". Nothing is my Number: An Exploratory Study with a Group of Dangerous Sexual Offenders in Canada, (Toronto: General Publishing, 1971). In the British context Chiswick has recently commented: "In prisons the safe care of sex offenders is a major and detestable problem". "Sex Crimes" 143 Brit. J. Psychiat. 236 (1983) at 241.

9. For a useful recent discussion of this matter within the Canadian context see West, Roy and Nichols, Understanding Sexual Attacks: A Study based on a Group of Rapists Undergoing Psychotherapy, (London: Heinemann, 1978) especially at 147-157.

10. Greenland and McLeod note that at least three of their 109-strong DSO sample (1948-1977) were killed in prison. See "Dangerous Sexual Offender Legislation 1948-1977, A Misadventure in State Psychiatry". Paper presented at the Annual Meeting of the Canadian Psychiatric Association, Winnipeg, Sept. 1981, at 26. Another DSO was murdered in Millhaven Penitentiary on August 10, 1983 (see the Globe and Mail, August 12, 1983 at 9).

11. See very generally, for example, the first edition of Eysenck's Crime and Personality, Great Britain: Routledge and Kegan Paul, 1964. Although his position has not changed greatly over the past twenty years, the book is of interest because of its generally optimistic note. That outlook seems to have been more prevalent in the mid 1960s than currently.

12. Sir Dennis Hill recently noted "Compared with past decades, the libertarian view that treatment and rehabilitation were effective agents, which in time might be perfected, has lost some of its credibility. Now the term 'treatment' has been replaced by 'management'". Preface to Hamilton and Freeman (eds.), Dangerousness: Psychiatric Assessment and Management, (London: Gaskell, 1982). Most readers will of course be aware of the impact of the study by Lipton, Martinson and Wilks, The Effectiveness of Correctional Treatment, (New York: Praeger, 1975).

13. Of course we should recognize too that, as Green puts it: "New categories of violence, new definitions of crime, come into being with changes in the norms". "The Violent Patient in the Community", Wright et al (eds.) note 1, supra at 177.

14. Howells describes what happened in Swansea in 1977 when it was planned to include a symposium on pedophilia in a conference on 'Love and Attraction'. Apparently this strictly academic affair attracted a huge amount of public reaction before it ever took place. He tells us: "Industrial action was threatened in the conference centre, the local newspapers mounted a campaign, and the symposium itself was ultimately closed to the press, in case inaccurate reporting should further inflame public reaction". Howells goes on: "It occurred to me that societal reactions to sexual deviance were of as much psychological interest as the deviance itself, and that the clinical problems of sexual offenders cannot be divorced from the social context of the community's image of - and reaction to - sexual deviance." In "Social Reactions to Sexual Deviance", West (ed.) Sex Offenders in the Criminal Justice System. Papers presented to the 12th Cropwood Round-Table Conference, December 1972, (University of Cambridge, 1980) at 20.

15. The impact of the media in influencing the public's image of the dangerous offender is an important topic in its own right. It is too difficult to deal with here at any length. When a dangerous offender reoffends after release, there is usually intensive press coverage. Following this there is a 'clamping down' on all other incarcerated sexual offenders (see Greenland and McLeod note 10, supra at 24). More generally there tends to be a simple-minded idea that such "toughening up" will of necessity yield increased safety to the public. A good recent example of this kind of thinking was published in the Toronto Star on Aug 4th 1983 under the heading 'Life in jail urged for dangerous sex offenders'. It states: "Dangerous sex offenders who repeatedly assault women and

children should be locked up and the keys thrown away", referring to a statement apparently made by the chairman of a Metro task force studying violence. The article goes on to point out that the solution lies in identifying sex offenders before they act out (something we would agree with in broad principle, see Chapter 2, Section 2:4) but asserts wrongly that "the Clarke Institute of Psychiatry in Toronto is now working on a system whereby dangerous sex offenders can be identified at least 80 per cent of the time...."

16. See Globe and Mail article entitled "Justice for Children: Nailing the Offender: If the law was changed youngsters could testify", dated Friday May 27th, at 7. The article makes the point that if Section 16 of the Canada Evidence Act were to be altered to permit persons under 14 to testify, it would be easier to secure convictions against sex offenders.

17. The reader will likely recognize that with the recent enactment of Bill C-121, penalties for sexual offences have been considerably increased. This we deal briefly with under Section 2:5 of Chapter 2.

18. It occurred to us that an alternative starting place for this report might be a thorough historical and cross-cultural review. Apart from the fact that this would take us too far afield, we were mindful of the caution given in the McRuer report (see note 7 supra). They state (at 60): "We wish to say at the outset that we have viewed with caution discussions on the subject of the sexual offender in countries other than Canada, because the legislation governing so-called sexual crimes varies widely between countries...." Also, there is already an excellent up-to-date review by Petrunik of the Ministry of the Solicitor General (see The Making of Dangerous Offenders: The Origins, Diffusion and Use of Legislation for Dangerous Offenders in Europe and North America, July 1981).

19. See Law Reform Commission of Canada, Working Paper 11, Imprisonment and Release (Ottawa: Queen's Printer 1975), especially at 27-31. The recommendations of the Law Reform Commission, backed as they were by considerable scholarship, were not followed when the law was changed in 1977. Readers of this report will not need to be reminded of the main recommendations. We include them here merely for the sake of completeness. The Commission recommended (at 30) that "Serious offences, including sexual offences, should be dealt with under the ordinary sentencing law". It was of the view (at 31) that "...a possible sentence of up to twenty years in cases of serious violence against persons should be adequate to deal with offenders who are thought to be a continuing risk to the personal security of others. Generally, the Commission was of the view (at 31) that: "The existing law relating to dangerous sexual offenders should be abolished". For an important paper which pre-dated the 1977 changes see Price, "Psychiatry, Criminal Law Reform and the 'Mythophilic' Impulse: On Canadian Proposals for the Control of the Dangerous Offender" 4 Univ. Ottawa L. Rev. 1(1970).

20. For an excellent review of this topic see Petrunik "The Politics of Dangerousness", 5 Int. J. Law Psychiat. 225 (1983). His conclusion is worth stating here (at 246): "In the end, whether we decide to retain or abolish legislation based on the dangerousness standard, ultimately the question is a moral and a social policy one: where do we draw the line in establishing a balance between individual rights and social protection? Since it is clear that even a few false negatives will continue to be regarded as too many and since it appears unlikely that false positives can ever be greatly reduced from their present level without increasing the number of false negatives, false positive rates well above fifty per cent may simply be the price we pay for legislation more demonstrably 'symbolic in its effects than instrumental' in reducing violence against individuals". See also 5 Kastner 1 Crown Reports (1982).

21. 688(a)

22. 688(a)(i)

23. 688(a)(ii)

24. 688(a)(iii)

25. 688(b)

26. 689(1)(a)

27. 689(2)

28. 690(1)(2)

29. 695(1)

30. 695(2)

31. See Greenland and McLeod, note 10, supra.

32. Jackson, Sentences that Never End: The Report on the Habitual Criminal Study, Unpublished report (Vancouver: University of British Columbia, December 1982).

33. A recent M.A. dissertation in criminology by MacKay, discussed briefly in chapter 2, draws attention to the fact that psychiatric opinions have a very strong influence upon whether or not to proceed against an individual under Part XXI. Although firm evidence is lacking, it seems that this point of engagement - one much less public than the court hearing itself - may be as critical as the formalities themselves. Senior Crown officials are, it would seem, more likely to proceed if there is, at the time of application, strong psychiatric opinion to the effect that the individual poses a danger to society. Very probably they will not make application if they do not have in hand supporting psychiatric opinion. It would be interesting to know exactly how much discussion goes on between Crown attornies and forensic psychiatrists at very preliminary stages.

34. It is the court's forcing of these kinds of forecasts upon clinicians which induced the distinguished American psychiatrist, Dr. Alan Stone, recently to comment: "To an empiricist, the logic is baffling. Listening to a lot of irrelevant and perhaps false information does not improve predictions. But to the legal mind, even a predictive decision, made in good faith after weighing all the evidence, has a kind of procedural validity even if it defies common sense and lacks moral substance", (In Webster et al., in press, note 4, supra at 17).

35. The eminent British forensic psychiatrist, Dr. John Gunn, has recently pointed out that such an adversarial approach can work quite well but: (1) "the psychiatrist must be clear in his own mind, and agree with his employer what his role is at any particular time" (at 9); and (2) "any psychiatrist involved in decisions about dangerousness and medical restraint should stick quite narrowly to questions of mental disorder" (at 10). He is quite emphatic about this second point, stating: "Psychiatrists are not necessarily experts in behavioural problems, unless those are derived from mental abnormality. To prevent psychiatrists from wandering too far from their legitimate territory, they should deal only with behaviour disorders when either they are requested to do so by the patient, or when it is clear that the individual is lacking in capacity or responsibility because of mental handicap" (at 10). At a more general level he states: "It is not part of our job, in making an illness diagnosis, to make a guilty assumption as well; we should stick much more to assessment of the disorder, and let the law take care of those other issues" (at 10). In Hamilton and Freeman, note 12, supra.

36. Another related point was brought out by one of the forensic psychiatrists we interviewed in association with this project. He pointed out that any defense lawyer worth his salt will advise his client to be very unforthcoming with the Crown-appointed psychiatrist. His view was that psychiatric examinations conducted under such conditions are frequently of very dubious value.

CHAPTER 2

REVIEW OF THE SCIENTIFIC LITERATURE ON ASSESSMENT, PREDICTION, AND TREATMENT

> "Science issues only interim reports".[1]
>
> "The law" said Jennings, "walks a respectful distance behind science".[2]

2:1 A Brief Review of Social Science Methods Pertinent to the Present Analysis

> Until recently a student of the judicial process could roam freely through the literature and only an occasional statistic would mar an otherwise serene landscape of rhetoric. He now faces a very different situation. Opening any recent book he may find himself confronted with chi-squares, t-tests, and even regression equations and factor analysis (Hogarth).[3]

In the past few years a good deal has been written to the effect that legal concepts such as "insanity",[4] "specific intent",[5], etc., do not find much meaning in psychiatric circles. The point is made that each sphere, law and psychiatry, has its own language or attaches quite particular meanings to everyday words.[6] This being the case, following Hogarth as quoted above, it is prudent to point out that social science researchers have their own set of beloved terms. It is hard to make much headway in the literature on the prediction of violent behaviour without a rudimentary knowledge of these basic concepts and it is for this reason we offer here a very brief outline of the main ideas, which though simple, are necessary for a full appreciation of the remainder of this chapter. In the companion volume, The Clinical Prediction of Dangerous Behaviour: Toward a Scientific Analysis[7] and elsewhere[8] we offer more detailed and thorough discussion of this topic.

False Positives/False Negatives

The basic prediction problem is most aptly summarized in a 2x2 table such as that given below. A person is predicted to be either dangerous (D) or not (ND) and that prediction is either right or wrong. A true negative (TN) occurs if the person is accurately predicted to be non-violent according to some outcome measure of dangerousness (e.g., police reports of rearrest, reconviction, etc.). He was said not to represent a danger and he did indeed prove safe. A true positive (TP) occurs when the predictor says a person will act violently and the person obliges by conforming to prediction. Obviously, what are needed are such 'true' or correct predictions. But, as we note below, what researchers tend to find - given the present nature of the art and science of predicting violence - are many false positives (FP) and at least some false negatives (FN). A

false negative describes a prediction where, contrary to expectation, an individual commits a violent act. The person who suffers as a result of this misjudgment is the victim. A false positive occurs when an individual predicted to be dangerous is not in fact so. The prisoner or patient himself will more than likely suffer the consequences of this inaccurate prediction through unnecessary confinement. The four possible outcomes are summarized below:

		OUTCOME	
		ND	D
PREDICTION	ND	TN	FN
	D	FP	TP

It is important to note at the outset that, very generally, the number of false negative decisions can be kept to an absolute minimum. This is achieved by releasing no one with the slightest taint of 'dangerousness' By taking no risks it is impossible to go wrong. But of course the price for such an extremely conservative approach to decision-making is paid in terms of very large numbers of false positives. As the probability of false negatives is reduced the likelihood of false positives increases; with the taking of more release chances the possibilities of (highly visible) errors rise. Since the effects of these two kinds of errors have markedly different consequences for different people (death or serious injury to the one; protracted denial of freedom and risk of violation by fellow inmates to the other), no strictly scientific solution is possible. All social scientists can do, and this only with very great difficulty and much inaccuracy, is state the risks of different kinds of decisions. As well, using a simple 2x2 table of the sort given above, they can determine the extent to which scores in the four cells exceed chance levels (through the use of a test called chi-square). In other words, researchers can bring the data forward so that they can be seen and analyzed. But these data will be variously interpreted. The gathering of actual data in recent years has, however, been no small accomplishment; the availability of a few facts, even contestable ones, has sharpened the thinking of the researchers, the mental health professionals and judges.

Correlation Coefficients and Significance

Instead of having a blunt Yes/No opinion about future dangerous behaviour it is possible to use more sophisticated predictor variables which allow for degrees of presumed dangerousness. All manner of scales can be employed as variables to assess potential for violence and there are intricate methods for integrating and weighting the individual scores from these various tests in order to reach a composite prediction score. Just as predictions can be scaled, so can outcomes. Although our knowledge of outcome scaling is less solid than that of prediction scaling, it is nonetheless possible to construct various types of

criterion measures, which are variables used to assess the degree of actual violence. With a set of scaled prediction scores and a set of scaled criterion measures it is possible to compare, or correlate, one with the other. There are various ways of performing these co-relation computations but, for present purposes, we need only remark that a correlation of zero indicates no relationship whatsoever between predictions and outcomes, and a correlation of +1.0 means perfect, or complete correspondence.[9] In the latter case the individuals predicted to have low potential for violence conformed to expectations by not acting highly dangerously and those expected to have a high potential performed their 'dastardly deeds'.

Perfect correlation between prediction scores and outcome scores is virtually impossible in 'real world' kinds of problems. It might be more reasonable to expect a correlation of, perhaps, +.70. This would indicate a fairly strong, but far from perfect relationship between the predictor and criterion variables. It is possible, and indeed necessary, to perform additional statistical tests to determine whether or not the +.70 relationship is 'statistically significant'. This test informs the researcher about the amount of confidence to be placed in the correlation. It is important to know how often the result could be expected to occur simply as a matter of chance. If a particular finding could have been expected to occur once in five times the relationship would, by convention, be regarded as non-significant. However, if it could be shown that the particular correlation would have been likely to happen only once in twenty times the correlation would be considered significant. When an investigator's result exceeds a chance occurrence of one in a hundred he or she is entitled to place in it a yet higher level of confidence. It is worth noting that the calculations for statistical significance of correlations depend critically on the number of cases in the computation; a relatively low correlation between prediction and outcome, of say +0.25, might be significant if based on a large number of observations but would not be significant if based on few cases. The important general point is that statisticians deal only with estimating occurrences against chance likelihoods. Statistical data, as well as predictions based on them, are only meaningful in terms of probabilities.

2:2 The Recent Scientific Literature on the Prediction of Violence

> ... I must add that it is very difficult indeed to design a piece of research which would meet the required standards of thoroughness. The difficulties include the relative infrequency of repeated violence; the very natural unwillingness of penal systems or hospitals to release violent inmates in an experimental way; the lack of reliable information about the situations in which the violence occurred; the still greater lack of information about violence which did not lead to prosecution or admission to hospital.[10]

As is clear from Nigel Walker's remarks quoted above, research in the present area of interest is hard to conduct. He notes that most studies

are marked by their lack of thoroughness in defining predictor variables and more generally, that they are "improvised pieces of research based on data which happened to be available".[11] Those studies were reviewed extensively by Monahan in 1981,[12] and in unpublished form by us somewhat earlier.[13] The reader interested in detail is referred to Monahan's excellent summary and also to our own review brought up-to-date for the Webster, Menzies, and Sepejak supplement to this volume.

Under ideal circumstances a researcher would be able to design experiments in such a way that, predictions about dangerousness having been made, randomly selected individuals would be confined or released. But of course this would be impossible because of the understandable lack of willingness on the part of the judiciary and the medical authorities to release potentially violent persons in an experimental fashion. Another problem faced by all researchers in this area is that violent behaviour has a low base rate of occurrence.[14] Low base-rate behaviours are very hard to predict. Then there is the difficulty of obtaining comprehensive follow-up information about violent events. Most criminals are anxious not to divulge incriminating information to researchers.[15] As well, there is the point that, in the ordinary flow of events, clinicians make recommendations to the courts and the courts act on these opinions.[16] This means that there are usually many kinds of contamination, all of which make for difficulty when it comes to statistical interpretation. If, for example, the psychiatrist says or hints that a particular offender has a high potential for violence, it may be that the judge will be apt to make a custodial disposition. In custody the man or woman will have sharply restricted and quite different opportunities for engaging in violent behaviour. No wonder Walker suggests that most of our current information comes from 'improvised' and inadequate pieces of research. Next we turn to a review of that research.

The Baxstrom Study by Steadman and Cocozza[17]

In 1966, an American Supreme Court [18] ruled that civil commitment proceedings by jury were necessary in order to detain involuntary prisoner-patients in secure psychiatric institutions after the expiration of their sentences. As a result, some 970 patients (often referred to as the 'Baxstrom' patients after the plaintiff in the case) were released to civil hospitals, outpatient settings or to the community. Steadman and his group were clever to see the value of a 'naturally occurring experiment' and to seize the opportunity to examine the post-release behaviour of a large number of mentally disordered offenders who, at some previous time, had been considered dangerous. The reader will note that the population in the Baxstrom studies is a 'criminally insane' one. It differs from the population detained under Part XXI. Yet both groups face indeterminate detention and so in that respect the policy issues arising from the research have at least some correspondence.

Steadman and his colleagues have followed the Baxstrom patients over many years and have written extensively on the topic. The essential point is that, generally, releasing this large number of patients did not produce the adverse effects which had been feared. In one frequently cited study,[19] data were provided on 98 Baxstrom patients followed for

several years after their release into the community. Rehospitalization was examined in addition to evidence of rearrest, since, in some cases, it will happen that a violent act committed by an ex-patient would lead to rehospitalization rather than rearrest and conviction. They found that 14 of 98 patients, or 15 percent, exhibited dangerous behaviour during the years of follow-up observation. Of these 14 patients, 11 could have been placed in an 'expected to act dangerously' category and the remaining 3 in a 'not expected to act dangerously' category (according to a specially-created Legal Dangerousness Score[20] and age). This first indication of a fairly accurate statistical postdiction of dangerousness is deceptive, however, since of the 84 patients who were not rearrested or rehospitalized for committing acts of violence, 25 had been assigned to the "expected to act dangerously" category. There was, in other words, a high level of false positives. The authors point out that, if no attempts had been made to predict dangerousness based on the pre-release characteristics used in this study, only 14 errors would have resulted from assuming non-dangerousness for all 98 patients. As it is, the division of patients into prediction categories according to the 2x2 table method outlined in the previous section, resulted in a total of 28 errors (3 false negatives and 25 false positives).

The design of this study was inadequate in many respects, due to no fault of the researchers. It could, for example, be argued that the fact that 84 of the former patients did not behave dangerously could be attributed to the effectiveness of treatment methods applied during the period of incarceration. Or it could be that the non-violent post-release behaviour of most of the Baxstrom patients was due to the fact that they had 'aged-out' during long periods of incarceration. One quite serious problem with the Baxtrom study, so far as the present review is concerned, is that no precise clinical prediction of dangerousness were on record. Quite possible the patients' continued confinement had more to do with bureaucratic inertia than 'dangerousness'. Despite these and other limitations the Baxstrom studies had the effect of putting the responsibility where it belonged, namely in the lap of the mental health workers and researchers.

The Dixon Study[21]

The Steadman studies have recently been replicated thanks to a similar court ruling in Pennsylvania over Dixon,[22] and to the wit of two other researchers, Thornberry and Jacoby. These investigators followed 414 former criminally insane patients as they were abruptly released into the community from an institution called Fairview. The 'crude recidivism rate' during the four-year follow-up period was 23.7 percent. In other words, if we concede for the moment that rearrest likely underestimates the actual level of violent behaviour, three quarters of the patients did not - contrary to expectation - reoffend. Moreover, it must be noted that a fairly large proportion of these arrests were for victimless and public order offences (25.4 percent). The authors remark: "Contrary to expectations generated by the clinical literature, the offenses committed by Dixon patients are neither predominantly violent nor are they sex oriented".[23] Thornberry and Jacoby, like Steadman and his colleagues, examined hospital as well as criminal records. Pooling information from

the two sources the investigators conclude by telling us: "The percentage of Dixon subjects who were dangerous, 14.5 percent, is remarkably close to the rate of 14.3 percent observed for the Baxstrom patients...."[24] As with the Steadman study, the assumption is made that the individuals being detained in these American hospitals are so confined because of their "dangerousness". That is, the staff members had made decisions which, when put to the test by 'freak' circumstances, were largely incorrect. In the authors' own words: "The results of this empirical investigation are quite discrepant with what would be expected based on the political prediction of the Fairview staff. If these political predictions had been accurate, the majority of the Dixon patients would have been dangerous after their release to the community".[25]

The Quinsey Studies[26]

Lest the reader think that these findings of over-prediction by mental health workers apply only in the United States we can, due to the diligent and sustained efforts of Quinsey and his colleagues at the Penetanguishene Mental Health Centre, demonstrate more or less the same outcome as was found in the Steadman and Cocozza and Thornberry and Jacoby studies. Of course we do not in Canada have the same penchant as in America for wide-ranging judicial action. We have not had Baxstrom- and Dixon-type cases.

But Quinsey and his group did grasp the opportunity to examine the post-release behaviour of 91 maximum security patients released by review boards during the period 1967 to 1971. Examination of subsequent conviction and rehospitalization records showed that 15 of the 91 subsequently committed violent acts. Analysis of patient characteristics revealed that only one variable, history of violence before admission to Oak Ridge, was statistically related to post-release violence. The difficulty, as in the two American studies mentioned above, is that we do not know whether the seemingly high level of false positives was due to clinical conservatism or to the effectiveness of treatment during the detention period. Or it could be argued that the review boards made the right decisions (i.e., if they had released individuals other than those they did, their 'batting average' would have been poorer). These Canadian studies, though valuable, are limited by the fact that the appropriate contrast groups are lacking and that the opportunities for a naturalistic study as in Baxstrom and Dixon have not arisen. It is helpful to be able to study the behaviour of persons released against psychiatric advice. Psychiatric opinion seems to hold stronger sway North of the border than South of it. Sometimes in the United States the courts, or judicial review bodies, act against psychiatric opinion in the matter of release decisions. Canadian researchers would no doubt welcome a similar adventuresome spirit in the matter of release decisions though whether members of the public would be of the same mind is another matter.

The Kozol Study[27]

A good example of such a 'release against advice' study is by Kozol and colleagues. This is an important paper in the present context because most of its 592 male offenders had been convicted of violent sex crimes. These men were assessed in detail by clinicians at the Massachusetts Center for the Diagnosis and Treatment of Dangerous Persons. As a result of this testing and reviewing, Kozol and his group recommended the release of 386 of the 592 patients. These offenders, considered non-dangerous by the review team, were released by the courts. The clinical group also unsuccessfully opposed the release of 49 others. Over a five-year period 8 percent of those predicted to be non-dangerous committed a violent offence. This is in contrast to a figure of 35 percent for those predicted dangerous. This clearly shows some predictive ability.[28] Certainly that is the way Kozol et al. interpreted the outcome. But, as we noted in the previous section, the relative levels of false positives to false negatives calls for interpretation. Monahan in his review of these findings[29] chose to emphasize the high, 65 percent, level of false positives in the group predicted to be dangerous. As he has commented more recently: "Despite the extensive examining, testing, and data gathering they undertook, Kozol et al. were wrong in two out of every three predictions of discovered violence".[30] An unpublished study similar in design to that of Kozol et al. but based on the Patuxent Institution in Maryland has been noted by Monahan in his recent book.[31] The results are very similar to those of Kozol et al. and have recently received the benefit of Steadman's close attention.[32] He, too, considered that the level of false positives was unacceptably high by almost any standards. Monahan notes that Steadman's analysis of the Patuxent data was partially instrumental in the abolition of Maryland's 'Defective Delinquent' statute.[33]

The Cocozza Competence Follow-Up Study[34]

Steadman and his colleagues must be given credit not just for bringing the prediction problem to the attention of the legal and psychiatric communities but for keeping it there. In a 1976 paper Cocozza and Steadman followed 257 persons deemed unfit to stand trial (mentally incompetent). All these individuals were examined by two psychiatrists. Sixty percent were deemed dangerous and 40 percent were not. Over a three-year follow-up period it was found that 49 percent of the dangerous group were rearrested. The difficulty is that 54 percent of the predicted non-dangerous group were again picked up. The figures for new violent offences for the two groups were 14 and 16 percent respectively. While it may be that various explanations might be offered to account for this result (e.g., that the effects of treatment are not considered), the essential findings are strong and cannot easily be dismissed. They are generally consistent with a few additional studies reviewed in the companion report, METFORS Working Paper 70.

The METFORS Studies[35]

The studies conducted at METFORS over the past several years, described in fuller detail in Working Paper 70, deserve brief mention. Opportunity was taken to invite clinicians to make predictions about future dangerousness on a simple scale. The subjects were prisoners referred by the courts for brief forensic psychiatric evaluations concerning fitness to stand trial. Hospital and rearrest records were examined after a two year interval. The reader will by this stage not be surprised to learn that most background variables (education, previous psychiatric history, etc.), did not possess much predictive power. However, psychiatric opinion did show a statistically significant effect in the 2x2 chi-square table but with, as might be expected, a high level of false positives. When predictions based on a four point scale were correlated with outcomes on an 11-point scale, a certain number of significant relations were found. In one set of data the correlations for individual clinicians and correctional officers ranged from -0.48 to +0.47. The inter-clinician disparity in this particular ability, at least as indexed by the methods used in this study, was striking, though perhaps not altogether unexpected. Leaving aside for the moment the fact that coefficients were generally low (a point we consider in Section 2:3 following) these results draw attention to the naivete of broadly-phrased questions like: Can psychiatrists predict dangerous behaviour? If the studies by Webster, Menzies and Sepejak are to be relied upon it would seem that what one clinician can do another may not be able to accomplish. Although they did not study large samples from the different professions, it does not seem that any one group stands out as being markedly superior to the others. With respect to the particular task at hand in this report, it is of note that psychiatrists as a group do not appear to possess singular competence in predicting dangerousness relative to their colleagues in allied disciplines.

The Mullen and Reinehr Study[36]

A very recent study serves as a useful point at which to close this part of the discussion. The authors attempted to develop an actuarial (statistical) method[37] for the prediction of dangerous behaviour of 269 adult male forensic patients admitted to a large state psychiatric hospital. These patients recieved a battery of psychological tests.[38] As well, after the patients had been on the ward for a period of at least a month, three members of staff gave a yes/no opinion about dangerousness.[39] With these opinions in hand the researchers were able to sift through their data from the psychological tests and identify statistically the variables associated with the clinical decision. The aim, then, was to create a formula for weighting the scores obtained from the various tests. If the formula proved 'right' it could conceivably supplement clinical decision making. But the hard test is to apply the actuarial scheme against a new cross-validation sample. Cross-validation, the application of techniques derived from one sample to another, is an important step since it allows the researcher to 'push around' the original set of data in order to yield new views. But the procedure demands that those views be tested afresh against a new group of subjects. Whereas the authors were able to derive a means to classify fairly correctly the original

group into dangerous and non-dangerous: "Application of this same equation to a cross-validation group (of a new 135 forensic patients)...resulted in a success ratio no better than would be expected on the basis of chance".[40] They add: "...[E]ven under unrealistically favorable conditions it was not possible to relate demographic variables or psychological test data to expert judgments of dangerousness when a cross-validation procedure was employed".[41]

As another aspect of the study, the researchers obtained four-year follow-up data on 165 of the original sample. Sixty-one of these had been judged by the clinicians as dangerous and 104 has been considered not dangerous. In the group judged dangerous seven were rearrested for a violent crime (11 percent); in the group considered non-dangerous there were eight rearrested (eight percent). The authors conclude: "These findings, although similar to those of some previous investigators, are hardly such as to inspire confidence in the validity of clinical judgment".[42] They also make a thought-provoking observation when they say that "...even the modest predictive validities reported in the literature might be further reduced by the incorporation of cross-validation groups into experimental designs".[43]

2:3 The Nature of the Prediction Task Re-Examined

Most readers will have come to this report with some knowledge of the fundamental complexities involved in attempts to predict the future dangerous behaviour of prisoners and patients. A few of these conceptual and practical barriers have been mentioned in what we have written so far. We shall now repeat these very briefly and then, without we hope testing the reader's patience too greatly, go on to list several additional sources of difficulty. Any attempt on our part to formulate policy will be premature until we first come to grips with the actualities of the scientific and clinical problems.

Fairly Obvious Difficulties:

1. 'Dangerousness' as a concept is obscure and difficult to define; the very notion means different things to different people at different times.[44]

2. Experimental analysis with random assignments to differentially treated groups is largely impracticable; valuable opportunities to follow 'natural experiments' occur infrequently.

3. Highly dangerous behaviours occur very seldom; it is difficult to predict such low base-rate phenomena.

4. The 'dangerous' populations which have been studied arise from more or less local attempts to assess and treat; this means that it is hard to compare one research sample with another.

5. Beyond a few attempts to define 'psychopath', and 'personality

disorder',[45] usually in gross and more or less common sense terms, no adequate psychiatric nosology exists to cover the kind of person who acts in a repetitively and persistently aggressive fashion; as well there is little in the way of appropriate-to-task psychometric instruments.

6. Accurate and complete criterion measures of violent behaviour at time of follow-up are hard to obtain for a variety of ethical and practical reasons; when it is possible to gather them it can prove difficult to integrate data derived from separate mental health and criminal justice systems.

7. There is lack of correspondence between legal decision-making and clinical decision-making; the law frequently demands yes/no answers to problems which can only be properly dealt with in terms of probabilities.[46]

8. Clinical opinions are, under ordinary circumstances, hard to evaluate because when they are accepted, as happens more frequently than not, they become untestable; if the individual is predicted dangerous he may be confined and thus the prediction itself cannot be checked.

9. Some clinical assessments are based on very limited samples of behaviour; a few clinicians seem unaware that, in all likelihood, a thorough face-to-face examination forms an essential aspect of the assessment process.[47]

10. Although some aspects of behaviour can be measured with great accuracy they may have little or no predictive validity; what is accurate may not be what is important.[48]

11. The prisoner may respond during assessment in ways very different from his usual conduct; because it may pay him to behave in an out-of-ordinary fashion, the clinical assessment may be largely irrelevant.

12. It is a mistake to assume that a clinician ought to be able to offer an opinion that is equally valid across cases; presumably he or she is entitled to be justifiably more confident in some assessments than others.

The Rather More Subtle Difficulties

1. There is likely much difference between what factors clinicians <u>think</u> to be important to them as they form opinions and what variables <u>actually</u> affect their views; persons have much less 'direct knowledge' of their cognitive processes than is commonly supposed.

The work of Nisbett and Wilson[49] has suggested that, in a wide variety of circumstances, individuals tend to use post-hoc rationalizations as explanations of their conduct. People do not even seem aware that they are doing this. If psychiatrists are asked why they think a given individual might be dangerous they will usually be able to supply not just one but several reasons. But, close examination of the actualities may show that a single factor has an overwhelming influence. This at any rate

is what Konečni et al[50] found as they studied the psychiatric decision-making process as it affects the decision to classify a person as a 'mentally disordered sex offender' (MDSO). From their extensive studies of psychiatric records they noted that one single factor, previous conviction of the person for sexual offences, predominated. As a result they concluded: "Indeed, to the extent that psychiatrists are basing their recommendations on such an easily observed and agreed upon factor as prior sex-related criminal record, their usefulness in the processing of persons suspected of being MDSOs would appear rather limited".[51] Such findings have obvious implications for the structure of legislation like that contained in Part XXI.

2. Correlations between prediction and outcome may be illusory; without systematic testing of loosely formulated theories, evidence in their support is incorporated selectively.

Human memory, including the memory of the trained clinician, can be highly selective. There is a tendency to remember clearly the cases where a correct prediction was made and to overlook or forget the cases where no prediction-outcome correspondence occurred. Certain kinds of clinical lore develop (e.g., that fire-setting and bed-wetting in childhood are good prognostic indicators for violent behaviour in adulthood). The clinician may routinely ask his or her patients about these matters. If a certain proportion of patients declare that they did have these difficulties in childhood, the clinician's 'theory' is strengthened, and it gets stronger with each positive case (since negative answers are dismissed). The cognitive processes of clinicians ought to be as much a subject of study as those of the patient. Speaking of such 'pseudo-scientific' theories, Diamond comments: "I am sure that many patients have been labelled as dangerous and have been institutionalized for long periods of time upon the basis of such flimsy criteria".[52]

3. Predictions can be framed so vaguely that they are scarcely amenable to disproof; clinicians should be able to do better than fortune tellers.

The art of fortune telling lies in making informed guesses about an individual from readily available data such as dress and deportment. With this as a base, it is then necessary to couch a few skilfully selected prognistications in terms so general that, almost inevitably, some 'hits' are bound to occur. It helps to make several predictions and it does not much matter, indeed it may help, if they are in fundamental contradiction. That these kinds of vague predictions are 'helpful' to 'clients', is well known.[53]

4. There is probably a 'sound barrier' of about .40 for correlation coefficients between prediction and outcome; the emphasis is too great on inferred inner traits and personality characteristics and too little on situational factors.

Our everyday language induces us to think in terms of personality traits. We think of forensic patients and criminals as being aggressive, friendly, intolerant, psychopathic, and so on. Whereas there are a vast number of traits or trait-like terms in the language, we have but a limited vocabulary with which to describe situations. And the fact is that some human qualities do appear to have reasonably good cross-situational consistency. Physical appearance is the most obvious of all examples but intelligence and expressive style are others. The difficulty is that the literature, over several decades of careful study, suggests that other traits such as helpfulness, honesty, persistence (and by extension, 'dangerousness'), may not really deserve the title of 'trait' at all. The reason for this is quite simply that people vary so greatly in their behaviour from one situation to another. Although the implications of this kind of thinking, outlined by Monahan[54] as well as ourselves,[55] are profound, they are little understood by practicing clinicians.

Bem and Allen[56] argue that we hold 'implicit personality theories' by which they mean we have "preconceived notions of what traits and behaviors go with what other traits and behaviors".[57] When the information is not actually 'there' we fill it in. We 'see' relationships which do not really exist. And once we have formed an impression of a person we tend to be biased by 'primacy effects' in that we assimilate pieces of information which support that impression all the while discarding other (equally pertinent) data which go against it. Stephen Pfohl has demonstrated that these observations have a direct applicability to the clinical assessment of dangerous behaviour.[58]

Generally, people tend to overestimate the extent to which behavior is trait-induced and to underestimate the power of external environmental variables.[59] As well as this there is the fact that the clinician tends to see his or her patients under conditions more restricted than is normally recognized (and that his or her very presence tends to evoke a more-than-usually consistent response). The clinic-bound assessor, who may in fact have a disproportionate amount of influence in the decision-making process, does in fact systematically exclude himself or herself from observing the wide range of situations really needed (in which variability in performance can be expected to be relatively high).

It would appear that some people are more variable than others in the extent to which they display such characteristics as friendliness and conscientiousness. The behaviour of some offenders could, it would seem, be predicted from one situation to another with passable accuracy. Here we might have correlations between prediction and outcome of, say, +0.70. Yet other offenders are hard to predict on the basis of test scores or interview ratings. For these offenders a positive correlation of, say, +.15 is as much as might reasonably be expected. But the reader should note that an offender in the latter group is not necessarily inherently more unpredictable. Indeed this may be a mark of his or her ability to make subtle discriminations. As Bem and Allen say: "Although such an individual cannot be predicted from a knowledge of his standing on a personality trait, he may be precisely the individual who is most predictable from a knowledge of the situation."[60] We shall need much more knowledge about the predictability of situations, and as well how particular offenders react to those situations, if we are in the future to

break the .40 barrier which, as we have tried to suggest, arises because of the fact that relatively predictable person/situations are confounded with relatively unpredictable person/situations.

5. Clinicians fail to gather and attend to base-rate statistics; opinion in the clinic is not sufficiently weighted according to known statistical facts.[61]

Busy practicing clinicians, especially those whose duties centre mainly on assessment work, tend to see each case individually and neither absorb published statistical realities nor collect their own base-rate data. Too frequently they perform their function in the complete absence of any form of feedback. Such clinicians are like blind golfers who tee off each morning with great elegance and form, but whose performance cannot possibly improve because they do not see where the ball lands and have no one to tell them. Golfers like these could, and likely would, make the same mistake every day for thirty years. Indeed they would probably get worse over time. This should be a disquieting analogy for all clinical decision-makers, especially those who, with less effort than they might realize, could trace their offenders over a period.

The problem here is the matter of attending to published base-rate data. Although current epidemiological studies are not without fault, we do in fact know a good deal about rates of recidivism for various types of crimes and particular kinds of offenders. These are established in the literature. But those who conduct assessments are not necessarily aware of the existence of the very base-rate data which ought to influence the making of decisions. In other words, members of a clinical team need to reflect if they find their team ascribing some particular condition to an extent that is markedly disproportionate to figures found in the literature (or indeed to those of a companion team composed of other colleagues in the same unit). The published figures, then, should have some corrective effect. Decisions ought not to be made in a statistical vacuum. Of course it is the individual cases before the clinicians which consume their attention during the actual assessment, but those cases need to be informed by findings gathered in a broader perspective.

6. There is a tendency to confuse accuracy of judgement with confidence; 'Barnum' effects are hard to avoid.

The more information a clinician has about a patient or prisoner, the more confident he or she is apt to be in his or her opinion. Yet there is no necessary relationship between confidence and accuracy. There is a particular problem if the information at hand is overlapping and redundant. The patient who achieves a fairly consistent set of scores in a group of tests is likely to make the assessor feel confident in his or her prediction. The clinician may fail to note that, in fact, many of the tests were redundant (i.e., they were multiple measures of more or less the same entity). The patient who achieved a rather wide range of scores in whatever tests were given will induce the clinician to feel relatively uncertain. But as Tversky and Kahneman point out: "...[A]n elementary

result in the statistics of correlation asserts that, given input variables of stated validity, a prediction based on several such inputs can achieve higher accuracy when they are independent of each other than when they are redundant or correlated".[62] They conclude: "...[R]edundancy among inputs decreases accuracy even as it increases confidence, and people are often confident in predictions that are quite likely to be off the mark".[63] This point has been made by Mischel who describes the so-called "Barnum effect".[64]

7. Due presumably to imprecise training, individual clinicians vary remarkably in their opinions regarding dangerousness, treatability, etc.; there is little consistency in clinical opinion.

That there are difficulties in obtaining acceptable inter-rater reliabilities among clinicians with respect to conventional psychiatric classifications is well-known.[65] But in the areas of 'dangerousness' and 'treatability' the difficulties are even greater. By way of example we can cite by Quinsey and Maguire[66] who recently examined data from 200 forensic psychiatric case conferences. They found remarkably little agreement among clinicians about the kinds of treatments thought to be required by different patients. The average correlation for opinions on treatability among nine clinicians was +0.43, for dangerousness ratings it was +0.53. It should most definitely be noted that in this study the clinicians achieved these modest correlations after discussing the cases among themselves. Had they rated the patients before they discussed them, the correlations would undoubtedly have been much lower. It is outcomes like these that have led Quinsey elsewhere[67] to comment:

> "It must be concluded on the basis of the research literature that at present there can be no experts in the prediction of dangerousness because there have been no convincing demonstrations of the predictive power of any class of variables in this area; there is, therefore, no area of knowledge to become expert in....Moreover, the very fact that some professionals believe they possess professional expertise and, therefore, that they should continue to testify in court on issues of dangerousness means that they are, in fact, less expert in the area of prediction of dangerousness than those who refuse to testify."

8. Some clinical assessments are inadequate because of the specific emotional, attitudinal, and other limitations of the assessor; dangerous and sex offending prisoners enter a sphere largely foreign to clinicians.

There is a risk that some clinicians have "negative counter-transference" toward particular prisoners.[68] That is, they dislike the prisoners for what they have done and for what they seem to represent. In addition, some prisoners can arouse in clinical assessors feelings of outright fear.[69] A clinician who has not learned to be aware of and to deal with these potential sources of personal disruption is not likely to

get close enough to the prisoner to be able to form accurate opinions. On this point it is worth noting that the clinician's particular personality may interfere with his or her ability to yield clear, more or less unbiased, reports. A second clinician may 'draw out' an apparently different person.

If we assume for the moment that progress in therapy is apt to be enhanced when the therapist has some regard for his or her patients, some acceptance of them and indeed some liking for them, then it is not hard to understand why the "dangerous offender" is so "untreatable" or even so unassessable. As the 'story' unfolds from documents and from the patient, so may rise the therapist's apprehension, even to the point of fear. With each successive disclosure the gulf widens; the assessor and assessee become ever more inhabitants of two separate universes.

9. Clinicians working in interdisciplinary teams tend to strike down plausible social explanations for deviance in an apparent effort to "fit patients into" theories of individual deviance based on psychopathology; pre-conceived theories built on pre-existing, partially-complete information can direct too fully the form of interview assessment.

The major work in this area has been undertaken by Pfohl.[70] He has published transcripts of actual conversations among clinicians as they reach decisions about the dangerousness of patients. Although one authority has argued that Pfohl's transcripts "leave much to be desired",[71] we have in response suggested that the work as a whole "warrants more enthusiastic consideration".[72] In general, we see analysis of the clinical decision-making process to be a matter of major scientific importance and a topic deserving of much attention by researchers.

10. Partisan professional interests impede the search for improved predictive capability; it takes courage on the part of individual practitioners to admit that at present the behaviour of some individuals under assessment is beyond control and prediction.

This point is put forcefully by Monahan when he says with emphasis: "The principal impediment to progress in the area of prediction is that most of the difficult problems hide behind a screen of 'professional judgment'".[73] And he elaborates, rightly in our view:

> What is necessary for moral and legal (and... empirical) progress in the area of prediction is a dramatic increase in the degree to which mental health professionals articulate what it is they are predicting and how they went about predicting it. This involves explicitly enumerating the kinds of acts one takes to be violent, frankly stating the factors on which the prediction is based, and being clear on the likelihood with which it is believed they will occur.[74]

Of no small importance too is the following quotation from Monahan. He says, referring to Morse: "Without such an influx of candor, predictions will rightly continue to be criticized as the imposition of the mental health professionals' personal values on decisions that should be left to others in a democratic society".[75]

2:4 Recent Informed Opinion about the Prediction Problem: Monahan's The Clinical Prediction of Violent Behavior

> ...to the greatest extent possible, the clinician should defer to the policymaker regarding questions of social and political value raised by violence prediction. These questions concern the definition of the violence one is predicting, the factors one takes into account in predicting it, the degree of predictive accuracy necessary for taking preventive action, and the nature of the preventive action to be taken. They are questions for the legislature, the judiciary and, ultimately, the voting public.[76]

> The prediction of violent behaviour is difficult under the best of circumstances. It becomes more so when powerful social and political contingencies pull and push the clinician, now in one direction, then in another. But such is likely to be the case for the forseeable future, until the patient's right not to be a false positive and the victim's right not to be set upon by a false negative are balanced in the courts and legislatures of the land.[77]

Monahan's book, which appeared in 1981, and which has already been mentioned in this report, has been well received by such authorities as Norval Morris,[78] Stephen Schlesinger,[79] and David Wexler.[80] One Canadian reviewer of the book, Richard Schneider,[81] gets to the heart of the text with his comments: "Often the reader finds himself saying '...well of course, what could be more obvious?', only to reflect for a minute and realize that many clinicians do not give obvious relevant factors adequate weight in their assessments of dangerousness".

As is clear from the two quotations by Monahan above, he is of the view that clinicians should, so far as possible, leave to policy makers decisions surrounding the predictions of violence. He explains, however, that his position has changed over the years. Whereas his earlier consideration of the literature inclined him to the view that the prediction of violent behaviour is all but an impossibility, he has now reached the conclusion that it is perhaps permissible and proper for some clinicians to make predictions some of the time.[82] He even gives at the end of the book a 14-point model self-questionnaire for use by mental health professionals. He believes that the model offers clinicians the prospect of professional integrity while providing potential for improved accuracy.

In an attempt to increase the accuracy of violence prediction Monahan enumerates common errors made by clinicians. This part of his discussion is similar to that given above.[83] Often the variables used as predictors are erroneously correlated with violent behaviour while the relevant base rate, "...the most important single piece of information necessary to make an accurate prediction",[84] is ignored or given secondary consideration to case-specific information, much of which may be unreliable or irrelevant. Mental illness is the most prevalent illusory correlate of violent behaviour. Once the demographic variables are held constant there is no statistical relationship between the two factors. Yet the traditional association of mental illness with criminal violence is still a pervasive popular myth.[85]

A greater reliance on actuarial prediction in preference to clinical prediction, which too easily lends itself to subjectivism and lacks specificity, may enable the clinician to increase accuracy and allow greater clarity in the prediction offered. In this regard Monahan discusses the major statistical correlates of violent behaviour.[86] These are frequency and recency of past crime, particularly of a violent nature, age, sex, race, socioeconomic status, stability of employment and alcohol or narcotic abuse. All of these have been shown to be statistically related to the occurrence of future violence. This is especially the case with numbers of past arrests which seem to be directly proportional to the probability of future criminality. Other factors which appear to be related to the occurrence of violent behaviour are I.Q., marital status, and residential stability. Once the base-rate of violence for the population to which the individual whose behaviour is being predicted has been calculated or estimated on the basis of these demographic characteristics, the possible common variances having been accounted for, this "anchor point"[87] of the prediction should be individualized through the use of case-specific information. This latter part of the prediction process should include personality factors, environmental factors and how they interact to increase or decrease the probability of violence.[88] As we have done above, Monahan argues that the cross-situational predictions, such as those studied in recent social-psychological research, do not allow for contextual differences between the environment of prediction and the context of validation. That is why such predictions are likely limited by a "sound barrier" correlation coefficient of about .40. As Monahan says: "It is the interaction of dispositional and situational variables that holds the greatest promise for improved predictive accuracy".[89]

Monahan makes a preliminary attempt to compile what seem to be the best candidates for environmental predictors. They reflect the support systems available to the individual for coping with life stress in a violent or non-violent manner, and the potential inherent in the environment for the individual to commit acts of violence. Different personalities respond to the same situation in diverse ways. Therefore, a method of assessing the interaction between the two is needed. Monahan suggests this can be done in two stages. First, by evaluating the person's predisposition towards violent or non-violent coping responses through the use of an adaptation of Novaco's[90] model of anger. Next, the situational demands that have evoked violent behaviour in the past should be assessed to allow comparison with the demand characteristics of the environment in which the person will be functioning. The greater the

correspondence between the two environments, the greater the likelihood of violence.[91] Theoretical study and research into the relationship between environments and the occurrence of violent behaviour[92] and the application of available information offer hope not only for improved predictability, but also for the treatment and placement of violent offenders.[93]

Although Monahan might be said to offer a generally positive and even guardedly optimistic view of clinical prediction, a close reading of the text shows that he is careful to delineate types of prediction problems. Persistent violent offenders may not require clinical evaluation. He draws attention to the fact that "the probability of future crime increases with each prior criminal act",[94] and employs Steadman's data[95] to make the point that "virtually all the violent crime committed by released mental patients is committed by patients who had an extensive criminal record before going into the mental hospital".[96] This, it seems to us, is an important consideration within the present attempt to explore the workability of Part XXI. Very broadly, it would seem that prior criminality more than mental illness is the key issue in Part XXI decisions. And as we argue below in Section 2:6 there is in fact good evidence that most persistent serious sex offenders in Canada are not psychiatrically disordered. It would seem that Monahan is referring precisely to a Part XXI-type decision making process when he says:

> As a matter of (personal) policy, for example, I see little value in psychiatrists and psychologists offering individual clinical predictions of violence for use in setting prison sentences for mentally competent offenders... Here I am more concerned with justice and deterrence than with predictive accuracy and would limit predictive considerations to a decidedly secondary role.[97]

Elsewhere in his text he points out, referring presumably to Part XXI-type decisions, that not infrequently mental health professionals have had powers "foisted upon them by legislatures and courts unwilling to face up to difficult moral and policy choices"[98] and wonders why the courts should ever bother wrestling over the kinds of factors that ought to enter into decision-making when "...they can just get a psychiatrist or psychologist to 'launder' ...these factors into a prediction based on 'clinical expertise'".[99] He is thus saying that, where the issue of mental incompetence does not arise, there should be no attempt by the courts to find 'launderers'.[100] From the point of view of the present report this raises an interesting question: To what extent is 'mental incompetence' a factor in persons for whom Part XXI applications are made? Fortunately we have a few preliminary pieces of information on this topic. They are discussed in Section 2:5 below.

Risk Assessment

Monahan's thesis requires but slight extension to suggest that mental health professionals need to think deeply before offering the courts 'opinions', 'predictions', or 'clinical intuitions'. These 'findings'

may, in actuality, be nothing more than a cloak for unacknowledged and undetected past criminal behaviour. Could it be that these predictions made on other than straightforward 'psychiatric cases', are at least in some instances, little more than a convenient way of avoiding the difficulty and expense involved in a thorough criminal investigation? In the limited context of 'Dangerous Offenders' would it not make sense, and would it not be more just, to do police work rather than mental health work?

Monahan suggests that it may be preferable to use actuarial as opposed to clinical predictions when dealing with correctional populations. He directs us to an Assaultive Risk Screening Sheet used by the Department of Corrections in the State of Michigan. With this analysis he provides impressive data showing that those placed in very high risk categories for recidivism are especially apt to commit new offences, but that there are few frequent repeaters compared to the offender population as a whole. He entreats us:

> Note that 40-percent accuracy on the basis of simply checking off the type of crime committed, the nature of institutional behavior, and whether an arrest occurred before the inmate's 15th birthday provides a higher degree of predictability than most of the clinical studies have been able to achieve after months of extensive (and expensive) examinations. Note, too, that such a degree of predictability applied to less than 5 percent of the sample.[101]

Since the publication of The Clinical Prediction of Violent Behavior we have had opportunity to examine data from a project on risk assessment in Iowa.[102] The system uses two separate but complementary scales. One deals with general risk of recidivism and the other deals with risk of violence. We are told that "... all items on which the risk assessment is based are objective offender characteristics known at the time of the assessment. No subjective judgments - such as of the offender's attitude or work habits - are required."[103] More specifically, they use the following information: current offence type; current age; age at first arrest; number of prior arrests; number of juvenile probations; number of juvenile commitments; number of prior adult convictions; number of prior adult probations; number of prior adult jail terms; number of prior adult prison terms; known aliases (yes or no); history of drug or alcohol problem (yes or no); history of narcotics use (yes or no); most recent employment status; occupational skill level; educational level; marital status; pre-trial status; and jail time on current sentence (if sentenced).

The author of the Iowa report, Daryl R. Fischer, will excite the interest of correctional officials with his statement:

> Recently, we estimated that if sentencing judges in Iowa would make use of risk assessment in the sentencing process, prison commitments could be reduced by 25% without further endangering the community. In fact, this 25% reduction could be achieved with the added benefit of a 15% reduction in the probation

> violation rate. In addition, because of our accuracy in pinpointing 'good risks', a much higher percentage of probationers could be handled under minimum supervision than is presently the case.[104]

Recent research published by the Solicitor General of Canada[105] deals with attempts to use risk assessment models for parole decision-making. The variables extracted were fairly similar to those noted in the Iowa study discussed above. However, these studies benefit from a considerably greater sophistication in statistical analysis. Although perhaps not quite as encouraging as the Iowa and Michigan results, they nonetheless yielded rather positive findings.[106] The researcher, Joan Nuffield, tried various models to predict general recidivism and found a simple summation of scores obtained from the prediction to perform optimally. There were five groups in an initial construction sample (based on 1238 persons) and five in a validation sample (based on 1237 cases). Parole success-rate scores for individuals in Group 1 of the validation sample (considered least likely to reoffend) was 85 percent. For persons in Group 5 (deemed most likely to recidivate) it was 32 percent. Groups 2, 3 and 4 produced scores of 68, 51 and 42 percent respectively. Data from the initial construction sample were similar. However, the test is not completely pleasing in that it fails to "...produce risk groups which separate large numbers of cases into categories with recidivism rates approaching either 0 or 100 percent".[107] Half of the Group 3 offenders 'failed,' yet they constituted 25 percent of the sample. Despite this, the author has performed a commendable service by persisting in Canada with this kind of actuarial analysis.[108]

Prompted directly by the general debate about and interest in 'Dangerous Offenders', especially the introduction of the Dangerous Offender legislation in 1977, Nuffield set out to examine in specific detail the problem of predicting violent recidivism. Her rationale was as follows: "On the assumption that Parole Board members and other correctional authorities are constantly required to assess inmates for their potential for violence anyway, it was resolved to attempt this notoriously difficult task, if only to demonstrate low rates of violent recidivism among offenders displaying characteristics allegedly predictive of violence."[109] She first addresses the 'base-rate' problem dealt with at length by Monahan and considered by us in the previous subsection. She offers Canadian data based on 2,500 cases to show that only 77 of these were convicted of violent sex offences (3 percent).[110] When we add the cases of homicide and assault, the figures rises only to seven percent (and 13 percent if robbery is added in). As she states, with such low rates "the prediction problem is considerable."[111]

This expectation of difficulty was confirmed. None of Nuffield's three risk assessment models had any predictive power worth mentioning. Her main observation of note from this part of the study was that "...assumptions about previous convictions for violent crimes being good indicators of violent recidivism may be unfounded."[112] She goes on to point out that: "...even offenders with five or more convictions for violent crime defined as homicide, assault, forcible rape, indecent assault but not robbery, had a 72.4% success rate (over three years) on the violent recidivism criterion after release. Inmates with one to three previous convictions for violent crime had a violent recidivism rate of

only 17.6%".[113]

The thinking behind the Nuffield study does, of course, have direct applicability to Part XXI considerations insofar as, under Section 695.1(1), the National Parole Board is responsible for the eventual release decision. Beyond this, though, it seems to us imperative that the same kind of logic be applied at the sentencing stage. This logic rests on the premise that the individual should be imprisoned for what he is known to have done, that the factors affecting length of sentence should be made explicit and provided openly to him, and because of the strong current trend to "question the validity of rehabilitation as an achievable goal,"[114] the present practice of indeterminate sentencing needs to be critically reviewed.

2:5 Recent Canadian Descriptive Studies on Populations Detained under Indeterminate Sentences

As we have noted above, Nuffield draws our attention to the fact that, very broadly, current thinking in Canadian correctional circles emphasizes a protection of the public rather than a rehabilitation model. It is therefore appropriate to ask, given Canada's six years of experience with Part XXI, from what dangers the public is being protected. What, in other words, are the characteristics of the persons presently designated as Dangerous Offenders? Fortunately a certain amount of information on this topic has recently become available. MacKay has recently examined files within the Ontario Attorney General's office.[115] He provides some description of the Ontario population found to be Dangerous Offenders and offers comments on the pre-hearing decision-making process. Additional information on the Canadian Dangerous Offender population comes from the Solicitor General's Secretariat.[116]

Information about Present Dangerous Offenders in Ontario and Canada

The Part XXI legislation, though still relatively new, has been in force for a sufficient period to make it of research interest. How many cases have been processed over the past six years? Is the frequency of use of Part XXI increasing or not? In what kinds of cases has it been applied? It was with these kinds of questions in mind that MacKay set out to examine all Dangerous Offender files in Ontario since 1977. The study yielded some useful 'hard' information about offender characteristics. It was found, for example, that all 27 cases so far processed were males and that, as might be expected, they were a few years older (median 30 years) than the general Ontario prison population (median years). Twenty-two of the applications arose out of sexual or sexually-related offences (81 percent). In the majority of cases, the offender inflicted injury on the victim, used a weapon, or the threatened death in the course of the offence which prompted the hearing (93 percent). Most had had at least one offence similar to the 'hearing offence' (78 percent) and of these 95 percent had served a previous sentence for the similar offence or offences. A rather large proportion had been on mandatory supervision or parole at the time of the index offence (33 percent) and an additional

number had recently been released from prison (26 percent). Prior to the present hearing 14 of the 27 (52 percent) had been previously convicted of offences for which they could have received a life sentence. Exactly the same number would have been facing a life sentence for the offence triggering the Dangerous Offender hearing. It is interesting to note that in 78 percent of cases the offender had received some form of psychiatric assessment prior to an application request. This points up the likely importance of psychiatric opinion not only at the time of the hearing itself but in setting the stage for the application. Very broadly, the sample was mainly characterized by diagnoses of 'personality disorder'. Psychotic conditions were mentioned relatively rarely.

Applications do not appear to have arisen from one or a few geographical sectors of the province and no single Crown Attorney has been responsible for more than three applications. The number of applications, given the relatively small number of hearings made over the six-year period, has been fairly stable. On average it took 139 days to process the 27 applications from request to finding. Of the 27 applications, 21 were successful from the Crown's point of view (78 percent) and the balance failed (22 percent). Nine of the 21 successful cases have been appealed. Two of the appeals have already been dismissed and seven are outstanding. One of the six cases which failed from the Crown's point of view is under appeal. No obvious relationship could be found between the amount of information submitted by the Crown Attorney in the course of his or her application and the actual outcome. One psychiatrist appeared (for the Crown) in slightly over half of the 27 cases (56 percent). No other psychiatrist testified more than three times.

Very generally, it seems that the prosecutors have the task of selecting cases in which an application is likely to succeed. Then, as is the case the making of similar crucial decisions within parts of the criminal justice and mental health systems, they must build or shape an application by putting forward their best case. This is a process which demands much careful thought. Psychiatric opinion would seem to be very influential both in advancing the application and later in court. Once the application is launched, it has a good chance of success since, given the criminal histories of many serious offenders, it is not necessarily hard to prove that an individual has committed a "serious personal injury offence" and has exhibited a pattern of "repetitive" or "persistent aggressive behaviour" or might bring "pain or other evil to other persons through failure in the future to control his sexual impulses". MacKay argues that in the future, research should be directed at the nature of the decision-making process itself as well as the study of violent offenders in their own right. It may be that the former kind of knowledge will prove more generally useful than the latter since what constitutes 'dangerousness' varies with the passage of time and alterations in administrative practices.

We know from information made available to us by the Solicitor General, Canada, that since 1977, 39 applications for 'dangerous offender' designation have been made in Canada. The bulk of these applications have arisen from within Ontario (24, with 18 being successful).[117] Six came from Alberta, five from British Columbia, two from Nova Scotia and one each from Saskatchewan and the Northwest Territories. It is, of course, of great interest that the other provinces have not chosen to use this

legislation. That Quebec, with its large population, has not done so is of special note.[118] Of the 39 applications, 32 were successful.[119] In all but two of these, indeterminate rather than determinate sentences were imposed.[120]

Although MacKay noted that the number of applications in Ontario had remained fairly stable over time, there is apparently a gradual increase in the frequency with which Part XXI has been used when the Canadian cases are considered collectively. The figures for new applications climb steadily from zero to 11 per year from 1977 through 1982. The gradual increase, therefore, comes from the legislation being increasingly used by provinces other than Ontario (Alberta, British Columbia, Nova Scotia, Saskatchewan and Northwest Territories).

Information on the current Dangerous Offenders sample is not yet complete, but certain facts are available on 24 of the 32 inmates. All are male. The bulk are Canadian by birth. Three, now Canadian citizens, are foreign born. Two are North American Indians. One is black. Three are from other minority ethnic groups. Two are epileptic and one is mentally retarded. Several apparently have histories of learning disabilities as well as perceptual and verbal handicaps. Perhaps a majority have 'unusual' physical appearances as well as 'bizarre' deportments. But, so far as is known only two had been temporarily deemed certifiably mentally disordered.[121] The majority were between 25 years of age and 40 with two being under 24 and two over 50.

It is of particular interest that only five of the 32 current dangerous offenders had no record whatsoever of sexual offences", and that, the current convictions for sexual offences involved primarily female victims. Convictions for crimes against children and adolescents were few in number. Three of the sex offenders apparently displayed no physical 'violence' but in these cases their offences were against children or teenagers. In the sample of 24, nine are serving their first penitentiary term. The longest previous period of incarceration in one case was only 38 days.[122]

The Ministry provided us with useful information about fixed-term alternative sentences which could have been imposed. Eleven of 24 could have been given a life sentence and, had multiple convictions been taken into account at sentencing, a further six could have been given periods ranging from 15 to 45 years. Another four could have received 14 years. The remaining three could have received maximum sentences of five, five and ten years respectively. But even these three, with the recent introduction of Bill C-121, would now be open to at least ten or 14 years' detention.

As might be expected, none of the 32 Dangerous Offenders has yet received any form of release. There is some evidence to suggest that some of the offenders have fear of being released because they themselves acknowledge an inability to control their impulses. One prisoner is said to have given up his appeal in the expectation that he would receive treatment.

It would be hard to argue that to date many of the present post-1977 Dangerous Offenders cohort have been badly done by.[123] The fact that

almost all are serving indeterminate sentences does not make much practical difference since, as we have said, all would be confined anyway on lengthy fixed-term sentences. But four issues do arise at the moment: (1) there is marked disparity among the provinces in the extent to which they are using Part XXI provisions (which on a common sense basis cannot but make one wonder whether the decision to proceed depends to a larger extent on the ideas of Crown administrators than the individual's particular record of dangerous behaviour); (2) there is seemingly a small but gradual increase over time in the use of the provision (which makes one wonder what will happen if this trend does not level off); (3) there is ample evidence that the use of Part XXI is being restricted largely to sexual offenders (which makes one question whether the provisions are being used in a discriminatory fashion given the fact that there must be many offenders who are just as violent as the present Dangerous Offenders, if not more so, and yet who are not proceeded against under this legislation)[124] and; (4) there is just a hint that, relative to other violent offenders, persons eventually sentenced as Dangerous Offenders may be an odd appearing, perhaps 'dangerous looking', group.[125] In recent years there have been two studies which examined the effects of the previous Habitual Criminal and Dangerous Sexual Offender legislation. These two reports raise points related to those we have just discussed.

The Jackson Report on Habitual Criminals[131]

Jackson and his law students have recently interviewed all 18 men in British Columbia prisons 'bitched' as habitual criminals before 1977. Very generally he has argued that the provisions have led to the unnecessary detention of many men over many years. He found marked regional disparity in the use of the legislation (with British Columbia having by far the largest number of cases); excessive use of the provision (its being applied to too many 'nuisance' cases); and improper use of the stipulated release procedures. He notes: "The length of time the men in the study have served as habitual criminals is greatly disproportionate to the harm or damage they have done and to the risk of further harm or damage which they may pose to the public. The men in the study have served more time than any other group of prisoners in Canada, including those convicted of murder."[127]

The Jackson study was recently cited by Mr. Justice Allen Linden in respect to one particular habitual criminal. This offender had served 12 years "after being convicted of 14 property crimes involving amounts of less than $50...."[128] As a result of the criticism of this case there is to be a judicial review of all habitual criminals, to determine if the ordinary parole provisions have served these men ill. Without wishing to overstate the point, it is hard not to question whether some researcher ten years hence will find that present parole-release provisions for dangerous offenders, if unchanged from the way they are now laid out in Part XXI, have been inadequate to the purpose. The Jackson report makes us question whether the as yet virtually untested Part XXI review process will 'work'. As stated above, this is not an issue now but will likely become one in the near future. Assuming for the moment that some form of indeterminate sentencing is to remain in the Criminal Code for the forseeable future, it might be wise to consider seriously the Jackson

findings as they relate to the kinds of issues dealt with in this report. The present release provisions under Part XXI do not inspire confidence; they seemed destined to produce a replication of the habitual criminal experience.

The Greenland and McLeod 1981 Study on Dangerous Sexual Offenders 1948-1977[129]

The Greenland and McLeod report is important to the present analysis because it is the only available study of the pre-1977 Dangerous Sexual Offender. Were it to have been the case that over the past six years the provisions of Part XXI had been applied mainly against persons guilty of dangerous non-sexual offenses, then the Greenland and McLeod findings might have been largely irrelevant to the present study. But we know from the information given at the beginning of this section that this is not the case. For these and other reasons, it is helpful to offer a cursory description of their report.

Greenland and McLeod had opportunity to examine all Dangerous Sexual Offender case files up until 1977. As well, they were able to study in detail the clinical and administrative records of 34 British Columbia and 28 Ontario Dangerous Sexual Offenders up to 1974. They tell us that between 1949 and 1977, 109 men were convicted as Dangerous Sexual Offenders in Canada.[130] As with the use of Habitual Criminal provisions (Jackson report), British Columbia accounted for more Dangerous Sexual Offender convictions than other provinces (40 as compared with 34 in Ontario and 10 each in Quebec and Alberta). These differences are large especially when sizes of provincial populations are taken into account. Although it is perhaps too early to tell, it looks as if this pattern is now recurring with the Dangerous Offender legislation. Always assuming for the moment that there are not specific factors which might explain adequately why there should be a relatively high proportion of seriously dangerous persons in British Columbia,[131] this finding is worthy of special note. Greenland and McLeod note rhetorically that the psychiatrists in British Columbia, relative to their colleagues elsewhere in Canada, were being induced by the province "to march to a different and evidently more savage drummer..."[132]

The study shows that 63 percent of offences committed by their cohort were against females with 37 percent against males. They draw particular attention to the fact that some individuals were convicted on the basis of acts which, though illegal at the time sentences were assessed, are no longer subject to sanction.[133] Their retrospective and admittedly somewhat subjective impression was that about a third of the population had committed offences which were seriously threatening to the lives or health of the victims. Another third were deemed moderately assaultive. The remaining third, frequently hetero- or homosexual pedophiles, had apparently shown poor judgment rather than violent behaviour.[134]

The Greenland and McLeod study, together with the books by Marcus[135] and West et al.,[136] give a good picture of the kinds of persons apt to be classified as Dangerous Sexual Offenders or Dangerous Offenders. Many of

the Dangerous Sexual Offenders were not exclusively sex offenders, a point now confirmed for the sex-offender members of the Ontario Dangerous Offender sample studied by MacKay. This, as Greenland and McLeod point out,[137] has important implications for the design of treatment programmes. Many of these people are chronic alcoholics.[138] As with the MacKay sample, the populations was more apt to be characterized as psychopathic and alcoholic (31 cases from Ontario and British Columbia) than schizophrenic (eight cases from these two provinces). They say:

> From this distance it is impossible to determine whether the considerable differences in diagnoses between B.C. and Ontario cohorts reflect the character of the offenders or the psychiatrists or a unique combination of both. In either case the lack of diagnostic precision coupled with the absence of specific treatments for conditions such as psychopathy, mental retardation and sexual deviation, presents a formidable challenge to the mental health professions employed in the penitentiaries.[139]

We have already seen that mental health workers face a formidable challenge and great responsibility in the task of predicting the future dangerous behaviour of prisoners. How are they facing the equally onerous challenge of providing treatment? That is our next topic.

2:6 The Assessment and Treatment of Serious Sex Offenders

In the previous section we noted that experience with Part XXI over the past six years has shown that, despite the powers contained in the legislation to deal with a broadly defined range of dangerous persons, its scope in actual application has been largely limited to male sexual offenders. For this reason it is necessary that the present report contain an outline of current thought regarding the treatment of 'sexual anomalies'. Just as Monahan's recent book on the prediction of violence aided our review so too are we greatly assisted by the newly-published account of sexual paraphilias in men by Ronald Langevin,[140] a researcher at the Clarke Institute of Psychiatry. The outline which follows is based largely, though not exclusively,[141] on Langevin's thinking.

In 1958 the McRuer Royal Commission[142] noted:

> Many of the witnesses who appeared before us assumed that a 'sexual psychopath' or a 'sexual pervert' suffered from a condition that could be 'cured'. We have heard no medical evidence to warrant this assumption nor have we been referred to any medical authority who would appear to give it substantial support. These witnesses emphasized that the public should understand that in the present state of medical knowledge it is not possible to speak with assurance about 'curing' the class of offenders we are considering.[143]

But in making this idea plain the McRuer report stood avowedly for 'special treatment' of sexual offenders. It was suggested that such an offender "...should be exposed to the best clinical treatment known rather than included in the ordinary prison population".[144] While conceding that some inmates would refuse treatment if available and that forced treatment would likely be worthless, the authors expressed strongly the view that "...all known medical treatment should be provided so that the period of preventive detention may be safely terminated as soon as possible".[145]

The McRuer report is now a quarter of a century old. Always recognizing that, then as now, it is often possible to treat effectively patients whose sexual offences are relatively minor[146] and who accept treatment willingly under suitable circumstances,[147] we can ask whether or not, since McRuer, there have been marked improvements in the design of treatment procedures for persons whose sexual proclivities may have highly serious consequences for others. For this Langevin, is of help.

A) **Phallometry as an Assessment Device**

The main advance that has been made over the past several years comes not so much in the area of treatment but in respect to behavioural assessment. That the assessment of sexual anomalies is presently possible is largely due to the gradual development and refinement of phallometric techniques pioneered by Freund.[148] Although these procedures are not immune to 'faking', phallometry is one of the most concrete current assessment methods.[149] Whereas the behaviourists had originally hoped to treat patients demonstrably more effectively than psychotherapists, it may yet turn out that their most important contribution will prove to be the perfection of an assessment technique ideally suited to monitor the progress of other approaches. What is needed, and what is now possible to a degree, is 'objective' scrutiny of the process of psychotherapy.[150] What are probably required are treatment programmes which use both psychotherapeutic and behavioural approaches.

Phallometric measures, though important, are inadequate as a sole or primary source of data. It is vital that the clinician also undertake careful interviews using one of a few presently available guides. And, as Abel and his colleagues[151] have demonstrated, it is necessary to move from the one source of information to the other. The patient or prisoner will likely give the 'real state of affairs' once he is confronted with an evidently out-of-line phallometric profile. It is difficult if not impossible to treat a condition, or help a person change a sexual preference, until the 'facts' are known. The patient himself may well not be aware of the reality of his particular sexual responses.

Although the idea of testing phallometrically for erotic preference is relatively new and not without its procedural difficulties, we would nonetheless suggest that within the next decade or two it will become routine.[152] The courts always have understandable difficulty in knowing when and how to incorporate new scientific measures (e.g., of hypnotic trance states, of voices under stress, of eyewitness testimony, of polygraphs, etc.), and are perhaps wise in "walking a respectful distance

behind science".[153] Yet, in our opinion, which is in accordance with that of Langevin, it seems only a matter of time before phallometry in conjunction with other measures becomes a judicially expected component in the clinical evaluation of serious sex offenders.

B) **Some Sexual Anomalies are Easily Treated, Others are Not**

Langevin points out that it is not hard to 'cure' various sexual anomalies if we are satisfied with the absence of recidivism as a sole measure of success. Society will accept this outcome gladly, so long as the person no longer offends. Even the therapist may be pleased with this state of affairs. And in some cases the patient too will be more or less content. Using recidivism as a measure it is possible, as it turns out, to be rather optimistic. Langevin has replicated the earlier observation of Mohr et al. in showing that, whereas the overall recidivism rate for most crimes is around 40 percent, the rate for sexual offences is about half that: "So simply leaving the patient alone and placing him on probation may be sufficient in most cases".[154] McRuer reached much the same conclusion.[155]

But the matter, especially as it relates to the substance of this report, is more complex. While the above may hold true for minor and first offenders, it is not easy to alter a long-held and frequently acted-upon preference, especially if the individual has no real desire to change. Dropouts in therapy are common. It is neither easy nor wise to force treatment (to say nothing of the ethical issues). As Langevin says: "The motivational state of the patient is paramount in treatment. There is no known treatment which will change the patient who does not want to change".[156] He speaks as one who has had clinical as well as research experience in the course of which he has faced some disappointments. He notes:

> Sometimes the patient sincerely wants to change because he has been caught and genuinely feels guilty and is repentant. However, confession may be good for the soul so that the guilt is short-lived and urges to act out are strong and satisfying enough that he wants to keep them more than he wants to stay out of trouble with the law or his family.[164]

To compel treatment by law for serious sexual anomalies may do no good. As Langevin says, and we would generally agree, "Court orders for treatment as opposed to jail or in addition to jail make it hard to enact any worthwhile treatment programme because treatment becomes a sentence rather than a therapy".[158] At the same time, however, it is vitally necessary that treatment programmes be available for those who want them during and after detention.[159] There is no logic to the idea that such treatment can only be rendered in the context of an indeterminate sentence;[160] indeed there is some suggestion to the contrary.[161]

There is another point from Langevin not unrelated to our attempt here better to define the most fruitful possible relationship between criminal law and the forensic mental health disciplines. He concedes that treatment

of sexual anomalies is made more difficult if the prisoner is 'psychotic' or 'legally insane'. So, a first step for the forensic psychiatrist is to determine if the person is mentally ill. Yet, according to Langevin: "This is rarely a problem in sexual anomalies since the majority are sane by any definition".[162] Persons who engage in violent sexual acts are generally thought to be personality disordered, not psychotic.[163] Although it is certainly true that there should be a role for the psychiatrist and psychologist when serious drug and alcohol abuse are complicating factors in the assessment and treatment of sexual offenders,[164] it is safe to side with Langevin when he notes: "Generally, life long or persistent sexual anomalies have not been associated with psychiatric disorders".[165] This does leave one wondering why, as a matter of routine under the law, practicing clinicians are required to testify in all Canadian Dangerous Offender hearings. How, one might ask, did they ever get into the position of offering these kinds of services and are they interested in getting out of the arrangement?[166]

C) The Efficacy of Contemporary Behaviour Therapy and Behaviour Modification

Very generally, Langevin argues that behaviour therapy in the Eysenckian tradition and behaviour modification techniques in the Skinnerian paradigm[167] need to be employed sparingly and thoughtfully. It is important to avoid the rush into treatment, using any one or more of many possibly dubious and ill-founded procedures, until full assessment has been accomplished. He suggests that, whereas a decade ago it seemed proper to proceed to treatment as expeditiously as possible, it now seems certain that researchers, and possibly some clinicians, tended at that time to underestimate the complexity of most sexual anomalies, and to place too much confidence in general principles derived from laboratory-based learning theories.

Langevin takes the view that the present reliance on aversive and punitive procedures warrants close attention. Citing from Holden he notes that we may have been 'sold' the modification of behaviour at the expense of the relief of suffering and reflects: "It may be our abhorrence of sexual anomalies that makes us want to use punishment procedures on them".[168] He goes on to state that aversion methods in the treatment of sexual anomalies presently outnumber other procedures by a ratio of two to one. In a very recent review of the use of aversive behaviour modification procedures with rapists, Quinsey has concluded: "Although many of these techniques can effectively reduce sexual arousal to aggressive cues as measured by changes in sexual responses, there are variations in effectiveness which are not well understood." He adds: "Unfortunately, there are no behavioural treatment studies of rapists, other than case reports, which include follow-up data. Thus the promise offered by short term improvement, even though impressive, has yet to be verified".[169]

D) **The Place of Physical Biomedical Interventions**

In recent years various drugs have been applied to reduce, if not the direction of sexually anomalous behaviours, then at least their intensity. Langevin suggests that, in certain highly specific cases, these drugs can, if properly monitored, prove helpful. But he is of the view that their use, over the long term especially, is suspect.[170] The drugs may be ineffective over the long run[171] because they oblige people to give up their erotic activities. Few patients are willing to do this and, besides, there may be serious hazards regarding the continued use of drugs like cyproterone acetate and provera at high levels. He concludes that generally: "They are not a treatment for sexual anomalies per se but only an adjunct while something else is done"[172] and that the therapist, rather than administer these drugs, is best advised to tell the cooperative patient "to masturbate before the urge to act out gets too strong".[173] But of course a little masturbation is unlikely to provide much of a solution for the serious offender. This Langevin recognizes when he goes on: "One must cope of course with the uncooperative and dangerous patient. When one is confronted with a rapist or sadistic murderer, release into the community is a perennial problem".[174] Perhaps the main point to be stressed is that our present knowledge of the biomedical and behavioural effects of antiandogenic drugs is very imperfect. As Bancroft has recently correctly noted: "Most of the studies have been uncontrolled and in such populations systematic and controlled evaluation is essential".[175] Generally he concludes that the use of thesse drugs to control sexual offenders is "of uncertain value" which in itself creates ethical difficulties so far as their application to convicted offenders is concerned. It will be interesting to watch for the publication of double-blend studies on the antiandrogens over the next decade.[176] In the meantime we can expect clinicians to employ this kind of remedy with caution while we wait for the results of much-needed research studies which will clarify the effectiveness and possible harmfulness of these substances.

Langevin suggests that castration, too, presents its own complexities as a suitable "treatment" for persistent sexual offenders. The procedure has the merit of permanence, of irreversibility. Yet, some individuals have committed rape post surgery.[177] Although the literature suggests that castration yields dramatic reductions in levels of post-surgical offending, there is nonetheless contrary evidence. Much may depend upon whether or not the castration is undertaken voluntarily or forced. Langevin notes that: "...the reactions of castrates are much more variable than earlier reports would indicate when controlled measures are used". And he adds, "The utility of castration has yet to be demonstrated".[178]

With respect to castration it is worth noting that stereotaxic hypothalatomy has been used in West Germany since 1962. Langevin points out that this is a form of "neural castration" but that it is unlikely to find general applicability (although it has reduced recidivism in the 75 cases so far studied). As he says: "Individuals who do not like chemical control of their bodies by antiandrogen drugs would likely object to being neural puppets".[178]

E) The Role of Psychotherapy and Group Therapy

Some twenty years ago, when behavioural theories began to become clinically important, it was fashionable to follow Eysenck[180] in his argument that psychotherapy, whether psychoanalytic, client-centred or other, on a group or individual basis, failed to achieve more than the spontaneous recovery rate. No matter what efforts were made, two out of three persons got better. However, just as behaviour therapists have had increasingly to recognize the complexities involved in many clinical difficulties, so too they have had to admit that such a general view of spontaneous remission is grossly oversimplified. It is now well recognized that different conditions have different rates of spontaneous recovery and that to say recovery is 'spontaneous' is to dodge the issue.[181] A more exact specification and description of the factors which promoted that recovery is required.

In recent years a good deal has been written about the characteristics of good therapists and what occurs between therapists and patients in the course of successful treatment.[182] Langevin has reviewed some of this work. He makes the assertion, previously much contested but now rather generally agreed, that it may not be the theory of therapy which is critical but the way that theory is expressed to the patient. In other words, therapist characteristics as well as patient characteristics must be taken into account very substantially when evaluating assessment and treatment procedures. Obvious though this may seem, and an earlier recognition of this notwithstanding,[183] it is very hard to get information about therapists. Trying to get information about patient-therapist interactions is even harder.[184]

In a searching and painstaking recent book on the effects of psychotherapy, Smith and her colleagues[185] have stated various general conclusions all of which seem to be in accord with Langevin's position. They bear restating here.

> 1) Psychotherapy is beneficial, consistently so and in many different ways. Its benefits are on a par with other expensive and ambitious interventions, such as schooling and medicine. The benefits of psychotherapy are not permanent, but then little is.
>
> 2) Different types of psychotherapy (verbal or behavioural, psychodynamic, client-centered, or systematic desensitization) do not produce different types or degrees of benefit.
>
> 3) Differences in how psychotherapy is conducted (whether in groups or individually, by experienced or novice therapists, for long or short periods of time, and the like) make very little difference in how beneficial it is.
>
> 4) Psychotherapy is scarcely any less effective than drug therapy in the treatment of serious psychological disorders. When the two therapies are combined, the

net benefits are less than the sum of their separate benefits.

What we have said so far is very general and not based specifically on persons with sexual anomalies. Langevin reminds us that: "Psychotherapy of sexual anomalies has typically been poorly reported and analyzed". He tells us that overall, in the treatment of homosexuality, "...psychotherapies are about as successful as behavior therapies"[186] and cites one study to the effect that about 40 percent of patients improve in treatment. All that Langevin could find on the use of psychotherapeutic approaches to heterosexual and homosexual pedophilia were a few case studies. This forced him to conclude that "...the total effectiveness of psychotherapy methods with pedophiles remains unknown".[187] Elsewhere in his book he comments in the same vein on sexual aggression and rape,[188] and sadism and masochism.[189] The reader should be careful here to note that the conclusion is not that psychotherapeutic methods have been shown to have failed. It is that they have not been shown to have succeeded.[190] The matter remains open. This is exactly the point recently made by Quinsey whose words should be allowed to speak to this point directly. He says:

> Although the emphasis of this review is on scientific evidence and evaluation (subjects which the group therapy literature fails abysmally to address), it should be noted that the lack of evidence cannot be used to infer that these programs do not work. Moreover, although the ultimate criterion of success is lowered sexual recidivism, treatment programs, particularly in maximum security settings, can serve demonstrably valuable functions, such as providing a humane system of inmate or patient management and functioning as a morale building tool for both patients and staff.[191]

Concluding Comments

Behaviourists over the past twenty years have contributed importantly in the area of methodology especially in assessment and short term treatment programmes. Phallometry and the construction and validation of interview schedules can be expected to advance substantially between now and the end of the century. And it is encouraging that most modern-day behaviourists have come to realize the full complexities of the problems they aim to alleviate. However, behavioural methods in and of themselves, especially limited aversive procedures, are not likely to achieve more than temporary positive clinical effects.

Psychotherapeutic approaches, applied to persons with sexual anomalies in clinics all over the world everyday of the week, remain unvalidated. Data and case reports are hopelessly unsystematized and incomplete. No doubt some therapists help some persons sometimes. But, despite much pontificating by certain 'authorities', we know very little indeed about how individuals change in therapy, or if in fact they alter in any important ways when it comes to sexual preferences.

Physical approaches to treatment remain at a crude level. A few procedures, some rather drastic, are available to provide temporary relief to some patients but most, if not all, are accompanied by unpleasant and possibly injurious side effects. What comes out of the Langevin analysis, and surely it is a correct view, is that with persistent sexual offenders we are dealing with a great variety of phenomena which cannot be explained by any single theory. Narrow applications of behavioural, medical, and psychoanalytic approaches have not really helped. These theories have been based on too much extrapolation from too few carefully collected facts. Although the dimensions of the assessment and therapeutic tasks are clearer than was formerly the case, we must conclude with Langevin that we do not yet have the knowledge to treat effectively the bulk of persons unfortunately detained within our penitentiaries and prisons. The problem is a big one and it does not begin and end with the treatment of sexual anomalies per se. Persons who end up designated as Dangerous Offenders have to make massive personal adjustments if they are to regain a place in ordinary society. This cannot be accomplished with a few conditioning or group-therapy sessions. But who in their right minds would think such a thing possible?[192]

The difficulties of treating dangerous persons in the community are considerable. Sometimes, however, this is achieved rather successfully by individual forensic clinicians. Risks, probably greater than more people realize, are sometimes taken by forensic psychiatrists in the belief that they cannot treat their patients if those patients are not subject to temptations and opportunities. They would argue that their effectiveness as therapists can only be gauged by the effects they have on patients as they live in a more or less ordinary world. None of this, of course, applies in most treatment programmes conducted within the penitentiary. There can be no appropriate measure of treatment effectiveness without gradual release. This one of us (BMD) has argued elsewhere: "When an offender's rehabilitation has reached a developed level, community release under adequate monitoring may be appropriate in order to assess social behaviour in the company of the other sex and to gauge suitability of release on parole".[193] Of course it could well be that carefully monitored gradual release after moderate periods of confinement is less risky to the public than abrupt release after long periods.[194]

2:7 The Hillen and Webster Ad Hoc Consultation Study

As we blocked out the reading which needed to be done for the present project it occurred to us that our work ought to be informed in some way by the opinions of professionals who have had direct or indirect experience with the Part XXI provisions and their application to practice.[195] As well as our extended discussion above in section 2:2 of Chapter 2 on what researchers, including psychiatric researchers, have published in recent years about the ability of psychiatrists and other mental health workers to predict the future dangers behaviour of individuals, it seemed necessary to find out what Canadian psychiatrists think about their capacity to make Part XXI-type predictions. In addition to our survey in section 2:6 above of the general scientific literature on the treatability of seriously sexually assaultive persons we thought we ought to find out what Canadian mental health workers in federal

institutions think about the prospects for rehabilitation. Similarly, as well as discussing the possible impact of the Canadian Charter of Rights and Freedoms, as we do in section 3:5 of Chapter 3, we felt that we ought to sample the opinions of senior Canadian lawyers on this point. Accordingly we set out to conduct some interviews. In the course of our consultative process, we gathered information from over 50 people who belong to the psychiatric, legal and research/treatment-oriented professions. They are listed in the acknowledgements section of this report. Due to the specialized nature of our project and the limited time and resources available, we did not undertake a random sampling[196] of experts but rather elected to use an informal approach to arranging the interviews. This, then, was by no means a comprehensive sampling of all the Canadian experts involved, either directly or indirectly, with the decision-making process and/or the implementation of the Part XXI provisions. These qualifications aside, we nonetheless achieved our objective of gaining some valuable informed opinion about Part XXI. Certainly the differing views helped us appreciate the full complexities of the issues. We also are of the view, which we hope is not presumptuous, that our meetings with colleagues helped them think about the present status of the law and its effects.[197]

Dissatisfaction with the current provisions as they exist was evident among the mental health professions. Of 22 psychiatrists surveyed (P Group), (64%) stated that they would retain the provisions but with some modifications. The balance, 36%, opted for abolition. No person canvassed in this group wished to leave Part XXI as it now stands. In the research/treatment (R/T) group, comprising 21 criminologists, psychologists and forensic nurses, (72%) opted for abolishing the provision altogether. One person (5%) wished to see it stand as it is now and the remaining 23% opted for modifications. The views from the legal profession (L Group) were more varied: 33% opted to abolish, 25% opted to leave it as it currently exists, and 42% wanted modifications.[198]

The general view from among those who opted to abolish Part XXI was that the current legal system, with the sentencing and parole procedures available, is sufficiently equipped to deal with Dangerous Offenders. As one psychologist pointed out: "Concerns about Dangerous Offenders should be handled by sentence length and parole eligibility and conservatism. I can't see the need for indeterminate sentencing". For those who suggested retaining the provision but with some modifications, the majority from the three groups would keep the requirements for expert testimony but would increase the frequency of review procedures.[199]

Asked whether the expert testimony should be required in S. 690 of the Code, however, 75% of those queried in the legal profession answered "No"; 75% from the research-treatment group also answered "No", and 57% of the psychiatrists responded with "No". One criminologist said that: "[I] don't think they should be required, but would always like to see their contribution as free to be solicited". Another criminologist held a different view: "I know that much has been written about how law and psychiatry do not meld. But the effort should continue". Comments from those in the legal profession tended to acknowledge that there are difficulties with the present requirement, but that a workable alternative does not exist. One lawyer said: "It is dangerous not to have it". Among the psychiatrists stating that Part XXI should be removed, one

commented: "[I] don't like being the criminal justice whipping boy on whom the whole thing turns", while another added: "The issue should be based on past adjudicated behaviour and nothing else". One of those who opted for the continued required use of expert psychiatric testimony qualified his answer by saying: "Only to determine whether those in a serious psychiatric illness present, illness that may impair his/her reality testing and which may be relevant to the offences - personality disorders are excluded".

It is clear that the need or otherwise for expert testimony was seen as a contentious matter in the three groups. Perhaps the crucial issue is whether psychiatrists are able to predict future dangerous behaviour with any degree of certainty. In all three groups, the majority, when asked to rate the ability of psychiatrists to predict a Part XXI type case on a 4-level scale from absolute certainty to a chance level only, stated that the psychiatric ability to predict was 'a little better than chance'. The R/T group offered opinions as follows: 10% - with reasonably acceptable precision; 71% - a little better than chance; 19% - at a chance level only. The psychiatrists said: 27% - with reasonably acceptable precision; 55% - a little better than chance; 18% - at a chance level only. The lawyers said: 20% - with reasonably acceptable precision; 67% - a little better than chance; 13% - at a chance level only. Not one person who participated in our survey stated that the predictions could be made with complete and absolute certainty. One psychiatrist commented that: "All we do is legitimize an administrative decision", while another stated that: "The wording of the section makes it almost impossible not to find someone a Dangerous Offender". One lawyer's view reflected a widely shared attitude: "Some people can make predictions on [the] basis of criminal history of the offender as well as the psychiatrist. For prediction based on past dangerousness, anyone can take into account the circumstances surrounding the act".

Across the three groups, the majority felt that past criminal history was a high to very high predictor in determining dangerous behaviour, while past psychiatric history did not merit the same weight. All three groups rated this factor more highly than the other alternatives listed (age, sex, race, socioeconomic factors, education and past psychiatric history.[200] However, many respondents stated a combination of these and other factors may be necessary to paint a clear picture as to the possibilty of future dangerous behaviour.

The psychiatrists were definite in expressing the attitude that they could offer no guarantees as to the accuracy of their predictions, unless there were mitigating factors such as a definable mental illness. In addition, the psychiatrists stated that they tend to make conservative recommendations, opting to err on the side of caution to protect society and their professional reputations. When asked to comment on whether extended determinate sentencing should replace determinate sentencing, 83% of the psychiatrists questioned would prefer determinate sentencing. Concerns were expressed about the possibly detrimental effects on therapy with indefinite sentencing. One stated: "Perhaps more consistent use of substantive sentences would be of some value - sentencing at present is almost as 'haphazard' as psychiatric opinion", while another psychiatrist commented that: "Part XXI - there are such people. We have a role to play in the assessment. But the indefinite sentence should be reserved

for the very rare case".

The view expressed by one psychologist that there should be extended determinate sentencing was qualified with the concern that: "There must be other provisions made for the incarceration of persons who are not certifiable by the Mental Health Act if the sentence terminates and the person still has not recovered".

Eighty-five percent of those in the R/T group preferred extended determinate sentencing to indeterminate sentencing. Of the L group (Crowns excluded), 60% felt that there should be indefinite sentencing, while 40% preferred extended determinate sentencing. One commented: "I'm not sure I'd want to legislate a minimum. But appeal courts would likely rationalize this over time. I would hope the appeal courts would ensure that sentences were appropriate".

Some of the questions in our interview schedule were of more interest to lawyers while others appealed more to psychiatrists and researchers. For example, the question: "Do you feel that the constitutional validity of Part XXI of the Criminal Code will now be in question due to the new Charter of Rights and Freedoms?" was not easily answered by the non-lawyers. About 40% in each of the two groups 'did not know'. Those that were able to express an opinion responded in the affirmative (about 90% in each group). The lawyers also tended to say "yes" but only 60% answered this way with the balance responding negatively. A question which psychiatrists were more at home with than lawyers was: "Are contemporary treatment procedures at least moderately effective with persons incarcerated for serious sexual offences?" Here 60% of lawyers responded 'don't know'. Of those who did give a definite opinion, all answered 'no'. Fifty-seven of psychiatrists gave 'yes' as the answer and 53% of the R-T group responded that way. One of the psychiatrists who answered 'no' stated that: "It is very late in their careers to begin treatment", and added "Treatment cannot be done inside".

Of all the opinions to emerge from psychiatrists in this survey, the most common was the sense they felt uncomfortable in the position of being asked to predict future dangerousness. This uncertainty seemed to arise from the fact that their opinions in this matter appear to have such a tenuous footing within the scientific framework. Although it would be unwise to take too seriously this composite view, which as we have repeatedly stressed is unrepresentative of a profession to which we do not ourselves belong, we are nonetheless struck by the fact that Canadian psychiatrists appear to think that they are being forced by law into offering opinions of dubious quality.

Chapter 2 - Footnotes

1. Smith, Glass and Miller, The Benefits of Psychotherapy, (Baltimore: Johns Hopkins, 1980) at 189.

2. Haward, "Experimentation in Forensic Psychology" 3 Criminal Justice and Behavior 301 (1976) at 301.

3. Hogarth. Sentencing as a Human Process, (Toronto: University of Toronto Press, 1971) at 29-30.

4. See Martin, "Mental Disorder and Criminal Responsibility in Canadian Law", in Hucker, Webster and Ben-Aron (eds.), Mental Disorder and Criminal Responsibility, (Toronto: Butterworths, 1981).

5. See Gold, "The Capacity to Form Intent", in ibid., at 63-77.

6. There have in fact been suggestions that "...psychiatrists are no more stable and have no greater interjudge agreement in using diagnostic terms than they achieve with everyday language. Additionally, the two languages appear to 'mix'. It is concluded that psychiatric nosology is not a true specialist language." Agnew and Bannister, "Psychiatric Diagnosis as a Pseudo-Specialist Language", 46 Brit. J. Med. Psychol 69 (1973) at 73.

7. Webster, Menzies, Sepajak. METFORS Unpublished Working Paper No. 70 (supplemental to the present report). See also Kijewski, METFORS Working Paper in Forensic Psychiatry No. 28, (1981).

8. See especially Sepejak, Menzies, Webster and Jensen, "Clinical Prediction of Dangerousness: Two-year Follow-up of 408 Pre-trial Forensic Cases", 11 Bull. Am. Acad. Psychiat. and Law 171 (1983); See also, Menzies, Webster and Sepejak " The Dimensions of Dangerousness: Evaluating the Psychiatric Predictions of Violence among Forensic Patients", Law and Human Behavior, in press; and Menzies, Webster and Sepejak "Hitting the Forensic Sound Barrier: Predictions of Dangerousness in a Pre-Trial Clinic" in Webster, Ben-Aron and Hucker (eds.), in press, Chapter 1, note 4, supra.

9. A significant correlation of -1.0 would indicate outcomes matched predictions exactly but in a direction opposite from that expected. A mental health professional who could achieve -1.0, though wrong in every case, would be a most useful employee. If he or she rated an individual as say very dangerous indeed, it would be safe to let the person go. If he or she considered the person to be utterly nondangerous, the authorities would be advised to lock the prisoner up without delay.

10. Walker, "Dangerous People" in D.N. Weisstub (ed.), Law and Psychiatry: Proceedings of an International Symposium held at the Clarke Institute of Psychiatry, Toronto, Canada, February 1977. (New York: Pergamon, 1978) at 60.

11. Ibid.

12. Monahan, The Clinical Prediction of Violent Behavior, (Beverley Hills, Calif.: Sage, 1981).

13. D.S. Sepejak, METFORS Working Paper in Forensic Psychiatry, No. 17, 1979. A modified form of this paper appears in METFORS Working Paper No. 70. See also Kijewski, note 7, supra.

14. Megargee, "The Prediction of Dangerous Behavior" 3 Crim. Just. and Behav. 3 (1976). Quinsey has, however, recently published an ingenious article which shows that it may be a mistake to over-emphasize the low base-rate problem. See "The Baserate Problem and the Prediction of Dangerousness: A Reappraisal", Fall J. Psychiat. and Law 329 (1980).

15. In one of our METFORS studies on the prediction of dangerous behaviour in mentally disordered offenders we had the idea of interviewing the former patients two years after assessments. But aside from the practical difficulties, we were discouraged by the ethical problems. What is a researcher supposed to do when he or she obtains the very information he needs (e.g. that the patient has during the period committed one or more serious personal injury offences)? This means that researchers are largely limited to using 'semi-public' data of the kind available from computer memory banks. Though better than nothing, such sources must surely grossly underestimate the amount of violent behaviour. The false positive rate may appear much higher than it actually is.

16. Webster, Menzies and Jackson, Clinical Assessment before Trial: Legal Issues and Mental Disorder (Toronto: Butterworths, 1981). See especially ch. 7 and appendix F.

17. Steadman and Cocozza, Careers of the Criminally Insane: Excessive Control of Social Deviance, (Lexington, Mass.: D.C. Heath, 1974).

18. Baxstrom v. Herold, 388 U.S. 107 (1967).

19. Cocozza and Steadman, "Some Refinements in the Measurement and Prediction of Dangerous Behavior" 131 Am. J. Psychiat. 1012 (1974).

20. This scale was composed of four items: (1) presence of juvenile record; (2) number of previous convictions; (3) presence of violent crime convictions; and (4) severity of original offence. Points were given for each such that a high score signified a relatively serious criminal history. Patients over 50 were expected to act less dangerously than those under 50.

21. Thornberry and Jacoby, The Criminally Insane: A Community Follow-up of Mentally Ill Offenders (Chicago: University of Chicago Press, 1979).

22. Dixon v. Attorney General of the Commonwealth of Pennsylvania 32F. Supp. 966 (M.D. Pa. 1971).

23. Thornberry and Jacoby, note 21, supra at 187.

24. Ibid, at 190.

25. Ibid, at 192. The word 'political' in the two sentences cited should be noted. As was the case with the Baxtrom studies, no proper clinical predictions appear to have been made or recorded. Quinsey made this point in a review of Thornberry and Jacoby's book (see summer J. Psychiat. and Law 329 (1980).

26. Quinsey, Warneford, Pruesse and Link ,"Released Oak Ridge Patients: A Follow-up Study of Review Board Discharges", 15 Brit. J. Crim. 264 (1975). See also Quinsey, Pruesse and Fernley, "Oak Ridge Patients: Prerelease Characteristics and Postrelease Adjustment", 3 Psychiatry and Law 63 (1975); Quinsey, Pruesse and Fernley, "A Follow-up of Patients found Unfit to 'Stand Trial' or 'Not Guilty' because of Insanity", 20 Canad. Psychiat. Assoc. J. 461 (1975); Pruesse and Quinsey, "The Dangerousness of Patients Released from Maximum Security: A Replication", 3 J. Psychiat. and Law 293 (1977).

27. Kozol, Boucher and Garofalo, "The Diagnosis and Treatment of Dangerousness" 18 Crime and Delinquency 371 (1972).

28. Presumably the nature of the release might be expected to influence in some indirect way the course of future behaviour. Knowing that the clinicians view a man as safe might induce him to be safe; knowing he is perceived as being a 'bad lot' might induce him to act accordingly.

29. Monahan, "Dangerous offenders: A critique of Kozol et al." 19 Crime and Delinquency 418 (1973).

30. Monahan, note 12, supra at 73.

31. Ibid, at 44.

32. Steadman, "A New Look at Recidivism among Patuxent Patients." 5 Bull. Am. Acad. Psychiat. Law 200 (1977).

33. Monahan, note 12, supra at 74.

34. Cocozza and Steadman, "The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence", 29 Rutgers L.R. 1084 (1976).

35. See note 8, supra.

36. Muller and Reinehr, "Predicting Dangerousness of Maximum Security Forensic Mental Patients", 10 J. Psychiat and Law 223 (1982).

37. The general idea of actuarial prediction is to create tables which enable the predictor to make more or less mechanical decisions through the appropriate statistical weighting of different variables. There has been a long-standing debate within psychology about the relative efficacy of clinical versus actuarial prediction. This controversy was largely inspired by Meehl's Clinical Versus Statistical Predictions (Minneapolis: University of Minnesota Press, 1954).

38. They used the Revised Beta Examination, the Buss-Durkee Inventory, the Holtzman Inkblot Technique, the Wechsler Adult Intelligence Scale and the Minnesota Multiphasic Personality Inventory.

39. The authors defend this approach on the grounds that: "No effort was made to provide the judges with a detailed definition of the term, since no such definitions are provided the statutory authorities; it was felt desirable to maintain as many points of comparison as possible between the two judgment processes. As in the statutory procedure, a majority decision was definitive; patients judged dangerous or not dangerous by two of the three judges were so labeled" (at 225). It is worth noting that some legally-inclined bodies recognize the futility of such decisions. See, for example, the Law Reform Commission of Canada's, Mental Disorder in the Criminal Trial Process, at 19. As well, see Monahan, The Clinical Prediction of Violent Behaviour, note 12, supra, at 40-41.

40. Muller and Reinehr, note 36, supra, at 228.

41. Ibid.

42. Ibid, at 229-230.

43. Ibid, at 230.

44. This point is made clear by Monahan (see note 12, supra) who draws our attention to the point made earlier by Sarbin, that 'violence' connotes action whereas danger denotes a relationship. He argues that it would be well to avoid the term dangerousness on the simple grounds that it has a "tendency in practice to degenerate from a characteristic of behavior to a reified personality trait" (at 29). He says, and we would agree, that "It may be conceptionally crisper to refer only to 'violent behavior' (or 'violence')" (ibid).

45. Although see Hare, "Diagnosis of Antisocial Personality Disorder in Two Prison Populations" 40 Am. J. Psychiat. 887 (1983).

46. See Monahan, note 12, supra at 40-41 and L.R.C. Report, note 39, supra, as well as Appendix A of METFORS Working Paper No. 70.

47. Recently the Canadian Psychiatric Association has found it necessary to make a statement relating to this point. Annotation #9 to the CMA Code of Ethics states: "A psychiatrist should testify in a court of law as to the mental state of a person only if he has examined that person. Such testimony should not be given solely as a result of observations made in the court room". 25 Canad. J. Psychiat. 437 (1980).

48. See Haynes, "The Predictive Value of the Clinical Assessment for the Diagnosis, Prognosis and Therapeutic Response of Patients', in Webster, Ben-Aron and Hucker, in press (eds.) note 4, Chapter 1, supra.

49. Nisbett and Wilson, "Telling More than we Know: Verbal Reports on Mental Processes" 84 Psych. Rev. 231 (1977).

50. Konečni, Mulcahy and Ebbesen, "Prison or Mental Hospital: Facctors Affecting the Processing of Persons Suspected of Being 'Mentally Disordered Sex Offenders'", in Lipsitt and Sales (eds.) New Directions in Psycholegal Research (New York: Van Nostrand Reinhold, 1980).

51. Ibid, at 113. They also state (at 112): "Thus, it would seem that despite the protestations that 'every case is different', that 'the complexity of cases and decisions defies the possibility of scientific analysis', that 'every participant in the system has a unique contribution to make and is not replaceable by an equation'; etc., which we have so often heard from judges and other participants in the legal system, the decisions in this system are just as predictable by a simple model as are those in other domains that have been mapped by logical/qualitative analyses".

52. Diamond. "The Psychiatric Prediction of Dangerousness" 123 U. Penn. L. Rev. 443 (1974).

53. This topic is admirably covered in Mischel's Personality and Assessment, (New York: Wiley, 1968). See also Chapman and Chapman, "Prediction in Psychiatry: An Example of Misplaced Confidence in Experts" 74 J. Abnorm. Psychol. 271 (1969).

54. Monahan, note 12, supra at 64-65.

55. Webster, Menzies and Jackson, note 16, supra at 127.

56. Bem and Allen, "On predicting some of the people some of the time: The search for cross-situational consistencies in behavior" 81 Psychol. Rev. 506 (1974) at 508.

57. Ibid.

58. Pfohl, Predicting Dangerousness: The Social Construction of Psychiatric Reality, (Lexington, Mass: Lexington, 1978).

59. See Bem and Allen, note 56, and Funder, "Three Issues in Predicting More of the People: A Reply to Mischel and Peake" 90 Psychol. Rev. 283 (1983). It must not be thought that this whole discussion is a matter for academic social and personality psychologists only. Steadman has recently seen the full significance of examining situational variables, especially the role of the victim in cases of homicide and assault. See, for example, Felson and Steadman, "Situational Factors in Disputes Leading to Criminal Violence" 21 Criminal 59 (1983).

60. Bem and Allen, note 56, supra at 517, emphasis added.

61. That this is a major problem in clinical decision making has become evident in the last decade, largely due to the ingenious work of Kahneman and Tversky on making judgments under conditions of uncertainty (see for example Tversky and Kahneman, "Judgment under Uncertainty: Heuristics and Biases", 185 Science 1124 (1974); and also their recent book by the same title). Although their work has not centred on how clinicians become biased in their opinions, their observations have clear relevance. In a typical experiment people are given a personality sketch

such as: "Steve is very shy and withdrawn, invariably helpful, but with little interest in people, or in the world of reality. A meek and tidy soul, he has a need for order and structure and a passion for detail" (at 1124). The subjects are then asked to assess the probability that his occupation is, say, farmer, salesman, airline pilot, librarian, or physician. Now it ought to be the case that, his character description notwithstanding, Steve is more likely to be a farmer than a librarian for the simple reason that there are in society far more farmers than librarians. Yet it would appear that such common-sense statistical considerations do not enter the decision-making process. Librarian is the usual choice of subjects and, (this is a key point), the subjects adhere to that opinion even when they are given data about the percentages of persons in the various occupations under consideration. The subjects could form a better judgment but they do not. In other experiments these investigators have 'whittled away' the content of the personality descriptions until they contain meaningless or irrelevant information. Generally, when this is done subjects will still use the 'personality' information rather than incorporate the 'statistical facts'. But they will use the probability evidence when none other is supplied.

62. Tversky and Kahneman, "Judgment Under Uncertainty: Heuristics and Biases", in Kahneman, Slavic and Tversky (eds.) Judgment Under Uncertainty: Heuristics and Biases (New York: Cambridge University Press, 1982) at 9.

63. Ibid.

64. Mischel bases his descriptions on a 1956 account by Meehl. He says: ...[W]e adopt the phrase Barnum effect to stigmatize those pseudo-successful clinical procedures in which personality descriptions from tests (or presumably other sources like interviews) are made to fit the patient largely or wholly by virtue of their triviality; and on which any nontrivial, but perhaps erroneous, inferences are hidden in a context of assertions or denials which carry high confidence simply because of the population base rates, regardless of the test's validity" in "Wanted - A Good Cookbook" 11 Am. Psychol. 263 (1956). In this connection the paper by Ulrich, Stachnek, and Stainton is of some note: "Student Acceptance of Generalized Personality Interpretations", 13 Psychol. Rep 831 (1963). The author made students complete a personality test. Subsequently they gave all 57 the same profile. This was a vacuous statement (including phrases like 'You have a strong need for other people to like you' and 'Your sexual adjustment has presented some problems for you'). Fifty three of those students thought the interpretation was excellent or good. Only one thought it poor. Some said that they had been substantially helped by the interpretation. Are many clinical assertions about dangerousness appreciably more accurate or precise than what was used in this study? Are clinicians really sure that they are making judgements on the data as they arise from the patient or, instead, on the basis of preconceived general opinions (which could be formed without reference to the particular person)?

65. Feinstein tells us (at 193): "The medical model of disease taxonomy may seem to have the appealing logic of etiology, but, in fact, the taxonomy is not logical at all. Its current array is an eclectically assembled, chronologic polyglot of different terms and ideas that reflect every layer of nosological thinking and technologic data from antiquity to the present". "A Critical Overview of Diagnosis in Psychiatry" in Rakoff, Stancer and Kedward (eds.) Psychiatric Diagnosis (New York: Brunner/Mazel, 1977). No doubt, if true, this helps explain why inter-clinician agreement is so poor.

66. A point made in the Quinsey and Maguire study relates to Section 2: 6 below on the treatability of sex offenders. In their discussion of the results the authors say (at 23): "Despite the poor agreement on treatability and on the relevancy of particular types of programs, it is clear that there is profound pessimism about treatment efficacy. This pessimism is most marked in connection with personality disordered offenders. Although there are no convincing data one way or the other, it is common folklore that personality disordered offenders are untreatable. Given the psychiatric community's belief about such offenders, it is quite clear that few of them will in fact receive treatment". ("Offenders Remanded for a Psychiatric Examination: Perceived Treatability and Disposition", paper submitted for publication).

67. Quinsey, "Predicting Dangerous Behavior: The Limitations of Psychology", (paper submitted for publication).

68. See Schiffer, Psychiatry Behind Bars, (Toronto: Butterworths, 1982) at 283.

69. See Prins, "Dangerous People or Dangerous Situations?: Some Implication for Assessment and Management" 21 Med. Sci. Law 125 (1981).

70. Pfohl, note 58, supra.

71. Lion, "Review of Predicting Dangerousness: The Social Construction of Psychiatric Reality by Stephen Pfohl" 136 Am. J. Psychiat. 1007 (1979).

72. Webster, Menzies and Slomen, "Comment on Lion's Review of Pfohl" 137 Am. J. Psychiat. 261 (1980).

73. Monahan, note 12, supra at 40.

74. Ibid.

75. Ibid.

76. Ibid, at 146.

77. Ibid at 169.

78. Morris, "Predicting Violence with Statistics: Review of Clinical Prediction of Violent Behavior" 34 Stanford L.R. 249 (1981). He uses words like "fine" and "indispensible".

79. Schlesinger, "Review of Monahan's Predicting Violent Behavior", 5 Crime and Delinquency 324 (1982). He says it is "a clear and succinct application of the 'state of the art'" and "a scholarly work which presents a clear understanding of enormously complex issues."

80. Wexler, "Predicting Violence: Is the Crystal Ball in Your Court? - Review of Monahan's Predicting Violent Behavior", 27 Contemporary Psychology 109 (1982). He notes that it is "essential reading for those confronted with the ethical and professional dilemmas involved in predicting violent behavior".

81. Schneider, "Review of Monahan's Predicting Violent Behavior" 24 Canad. J. Crim. 355 (1982).

82. "Rather than demonstrating that all forms of violence prediction are 'doomed' as I have previously stated (Monahan, 1976), a more discerning reading of the existing research suggests that it demonstrates the invalidity only of predictions made in one context that an individual will be violent in another, very different context. The context of prediction in the existing research is a closed institution in which the individual has resided for a significant period of time (several months to several decades). The context of validation is the open community" (note 12, supra at 89). What Monahan is leading toward is the idea that accurate short-term 'emergency' predictions may offer relatively more hope for would-be predictors (at 90-92). If the situational and temporal gap between predictor and criterion measures is small then the possibility of a correct prediction is correspondingly large. Although there has been some recent research to substantiate this hypothesis (see Rofman, Askinazi and Fant, 137 Am. J. Psychiat., 1061 (1980)) readers interested in the present Part XXI issues, will note that the 'gap' could scarcely be larger. Clinicians are asked to predict over a long period (which will include imprisonment) and to guess at the features of the post-release social and physical environment.

83. That this should be so is not surprising since we, too, published a book in this area in 1981 (note 16, supra) and we, like Monahan, were greatly influenced by the work of Saleem Shah and Edwin Megargee.

84. Monahan, note 12, supra, at 60. Emphasis in original.

85. See particularly our book chapter: Menzies, Webster, and Sepejak, "At the Mercy of the Mad" in Rieber (ed.) Advances in Forensic Psychology and Psychiatry, (New Jersey: Ablex, in press). A version appears in Working Paper No 70.

86. Monahan, note 12, Supra, at 104-112. There is, though, more to this than knowing about base-rate predictor variables. As well, the clinician has to be able to document in an orderly fashion and in such a way that the logical processes in decision-making are made evident and communicated clearly. These points have been admirably stated in a recent paper by Kroll and Mackenzie, "When Psychiatrists are Liable: Risk Management and Violent Patients" 34 Hosp. and Comm. Psychiat. 29 (1983).

87. See Shapiro, "The Evaluation of Clinical Prediction: A Method and Initial Application", 296 New England J. Med 1509 (1977).

88. See Megargee, note 14, supra.

89. Note 12, supra at 93.

90. See Novaco, "The Cognitive Regulation of Anger and Stress", in Kendall and Holden (eds.), Cognitive - Behavioral Intervention: Theory Research and Procedure, (New York: Academic Press, 1979).

91. See Bem and Funder, "Predicting More of the People More of the Time: Assessing the Personality of Situations", 85 Psychological Review 485 (1978).

92. For an excellent discussion of this topic see Steadman, "A Situational Approach to Violence," 5 Int. J. Law Psychiat. 171 (1982).

93. A recent Dangerous Offender hearing in Waterloo-Kitchener is of some interest. The offender, who had a clear record of serious psychiatric difficulties, had pulled a policeman's gun out of his holster and had threatened to kill him with it. The hearing centred, to no one's surprise, on the accused's "dangerousness". What was lacking was a close study of the precise conditions which triggered the dangerous act. That is, although the officer was part of this alarming event, his conduct was not open to scrutiny. Our point is solely that if one wishes to understand a dangerous exchange, it is necessary to study fully the victim's conduct. It is not just a matter of settling the facts from the previous incidents but trying to determine their possible bearing on future action. In this case we see clearly the need for the convicted man to be maintained under conditions of close security and close supervision. In certain states he is a clear menace to police officers. The question, though, is: Can his hihgly specific problem (involving police figures) be dealt with solely through extended incarceration? Assuming for the moment he eventually gains release, police officers may be at even greater risk at his hands. It could be that police officers as well as being part of the problem would be needed as part of the solution.

94. Monahan, note 12, supra at 104.

95. Steadman, Cocozza and Melick, "Explaining the Increased Crime Rate of Mental Patients: The Changing Clientele of State Hospitals", 135 Am. J. Psychiat. 816 (1978).

96. Monahan, note 12, supra at 105.

97. Ibid, at 37-38. Emphasis added.

98. Ibid, at 41.

99. Ibid.

100. In the United States case of Barefoot v. Estelle, the Supreme Court ruled on July 6, 1983 by a 6-3 vote that psychiatric testimony regarding an accused's future dangerousness can be used in capital cases, even if the psychiatrist had never examined the defendant. Barefoot's challenge to the use of psychiatric testimony relied heavily on a brief submitted to the court by the APA last March. In rejecting the APA's

advice, Associate Justice Byron R. White suggested that barring psychiatric predictions of future dangerousness would be

> ... somewhat like asking us to disinvent the wheel... We are not persuaded that [psychiatric] testimony is almost entirely unreliable and that the fact-finder and the adversary system will not be competent to uncover, recognize and take due account of its shortcomings. There are those doctors who are quite willing to testify at the sentencing hearing ... and who expressly disagree with [the APA's] point of view.

101. State of Michigan. "Summary of Parolee Risk Study." (Unpublished manuscript, Department of Corrections, 1978). Monahan, note 12, supra at 103.

102. Fischer, "Risk Assessment in Iowa", Statistical Analysis Center, Iowa Office for Planning and Programming. (Unpublished manuscript, November, 1980). A particularly important paper in this area has recently been published by Forst, Rhodes, Dimon, Gelman, and Mullin, "Targeting Federal Resources on Recidivists: An Empirical View" 46 Fed. Probat. 10 (1983). They say: "The emerging evidence indicates that prosepective identification of crime-prone offenders, while imperfect, can nonetheless be done with a moderate degree of accuracy in some settings and a high degree in others. More importantly, statistical prediction of criminal and deviant behavior has demonstrated itself with some consistency to surpass the accuracy of subjective prediction by clinicians and other experts" (p. 11).

103. Fischer, note 102, supra at 2.

104. Ibid, at 3.

105. Nuffield, Parole Decision-Making in Canada, (Ottawa: Ministry of Supplies and Services, 1982).

106. Ibid, Table 2, at 45.

107. Ibid, at 46.

108. There has in fact been Canadian work by Waller, McNaughton-Smith and Leveille which predates Nuffield's contribution.

109. Nuffield, note 105, supra, at 48.

110. Ibid, Table 3, at 32.

111. Ibid, at 48.

112. Ibid, at 55. This is not to say that previous violent crime is not a factor of some importance. Nuffield points out in a footnote (at 55) that "...there is some positive association between previous violent crime and violent recidivism. This predictor alone, however, does not offer much help in identifying the violent recidivist because a substantial majority of persons with a record for violence do not

recidivate violently."

113. Ibid. The reader will likely be interested in success rates (no re-arrest within 3 years for an indictable offence) for various categories of offences (see Nuffield, Table 8, p. 41). They are (1) non-violent sex offences - 78%; (2) narcotics offences - 74%; (3) homicide - 73%; (4) other crimes against the person - 70%; (5) unarmed robbery - 67%; (6) other property crimes - 59%; (7) violent sex offences - 57%; (8) armed robbery - 56%; (9) assault - 55%; (10) fraud - 55%; (11) theft - 51%; (12) receiving or possessing stolen goods - 50%; (13) break and enter - 45%; (14) weapons offences - 43%; (15) escape - 33%; (16) other - 70%. These figures were based on 1238 cases. Emphasis added.

114. Supra, note 104 at p. 62.

115. MacKay "Dangerous Offenders in Ontario 1977-1983: Making the Decision to Proceed", Unpublished M.A. Dissertation, Centre of Criminology, University of Toronto, 1983. We thank him for his permission to use the material.

116. We acknowledge with thanks the Ministry's help with this part of our report.

117. That these figures are discrepant with those of MacKay is due to the use of slightly different cut-off periods.

118. Both Quebec and New Brunswick have an application in progress.

119. Of the seven 'failures', six were rejected by the sentencing court. The other succeeded in court but was rejected on appeal. It was found that this case was not a 'serious personal injury offence'. The final sentence was one year.

120. Fourteen years in each case.

121. Both had been returned to the correctional system from provincial mental hospitals.

122. Ibid. Ten years was the maximum. One man, not a sex offender, had served 14 previous penitentiary terms for property crimes and violence. While some offenders appear to have shown a pattern of escalating violence over time, others had remained free of charges for long periods (22 years in one case).

123. Apart, of course, from the obvious fact that, from a psychological point of view, it is harder to serve time on an indeterminate rather than a determinate basis.

124. This point was made to us very forcefully by members of the treatment staff both at the Regional Psychiatric Centre in Abbotsford and the Regional Treatment Centre in Kingston Penitentiary.

125. Obviously a fair amount of caution is needed in even suggesting the possibility that judges may sentence persons as Dangerous Offenders because they don't like their looks'. Judges are supposed to be able to rise above this sort of thing. Although most of them likely do so most of the time, we would not wish to overlook what some social psychologists have been telling us for years about the sometimes powerful effects of physical appearance on decision-making of many kinds (see for example, Mashman, "The Effect of Physical Attractiveness on the Perception of Attitude Similarity" 106 Journal of Social Psychology 103 (1978). See also Howells, Chapter 1, note 14, supra.

126. Jackson, Chapter 1, note 32, supra.

127. Note 127, supra at 7.

128. Globe and Mail, 14 July 1983, at 5.

129. See Greenland and McLeod, Chapter 1, note 10, supra. A Shortened version of this paper entitled "Dangerous Sexual Offender Legislation in Canada, 1948-1977: An Experiment that Failed", is in press with Canad. J. Crimi..

130. The reader should note that the figures for DSO convictions over the 1949-1977 period were fairly stable. Numbers for the periods 1949-53, 1954-58, 1959-63, 1964-68, 1969-73, 1974-77 were 16, 15, 14, 32, 21, and 11 respectively. There was, in any event, no simple steady rise in use (see Greenland and McLeod, note 134, supra, Appendix A, Chart 1).

131. Discussing this matter casually with a lay person in British Columbia one of us (CDW) was recently reminded: "Olsen did come from British Columbia didn't he? Maybe there aren't people like him in the East"! And a thoughtful government official remarked wryly that maybe the relatively high incidence of dangerous persons in B.C. "has something to do with the rain and the trees". Our point is that these apparent differences in sentencing practices among provinces require very close and detailed examination. The topic warrants proper study in its own right. It is a complicated issue which is dealt with rather well by Griffiths, Klein, and Verdun-Jones Criminal Justice in Canada: An Introductory Text, (Toronto: Butterworths, 1980) especially pages 188-193). Among other points they make is the following (at 188): "...[A]lthough Canada has a uniform Criminal Code for the entire country which seemingly provides the same sentencing alternatives for all judges, in actuality this is not the case in that the support services which make these alternatives viable are not equally well developed across the country". Without wishing to detract from our point that it is vital to monitor clinical assessment and judicial sentencing practices, especially as they relate to key decisions such as those involving indeterminate sentencing, it is unwise to take simple statistics at face value. This point, too is made by Griffiths et al. They say (at 190): "To look at data which show variations in sentencing patterns across the country might be to come to the conclusion that a major problem with the criminal justice system is that of the differences in sentences given for seemingly similar offences. To some extent that certainly is the case. However to take such data at face value is to engage in an exercise of lying with figures". If society wants to individualize and humanize justice, a lack of uniformity in

sentencing will remain an inevitable feature of its criminal justice system".

132. Greenland and McLeod, note 134, supra at 10.

133. Specifically anal intercourse between consenting adults in private was a criminal offence until 1969.

134. Greenland and McLeod, note 129, supra at 16. Elsewhere in the report they note (at 29): "It is a strange commentary on our scale of human values that the least offensive DSOs have been incarcerated for an average of 14 years compared to an average of 10-12 years for murderers released on parole" (p. 29). In this they are referring mainly to homosexual pedophiles.

135. Marcus, Chapter 1, note 8, supra.

136. West et al., Chapter 1, note 9, supra.

137. Greenland and McLeod, note 129, supra at 18.

138. One of the penitentiary treatment staff interviewed by us said: "Our whole treatment effort is bedeviled by alcohol and drugs".

139. Greenland and McLeod, note 129, supra at 19.

140. Langevin, Sexual Strands: Understanding and Treating Sexual Anomalies in Men, (New Jersey: Lawrence Erlbaum, 1983).

141. Crawford, for example, reaches conclusions generally similar to Langevin's. See "Treatment Approaches with Pedophiles", in Cook and Howells (eds.) Adult Sexual Interest in Children, (London: Academic Press, 1981), at 181-217.

142. McRuer, Chapter 1, note 7, supra.

143. Ibid, at 83.

144. Ibid, at 84.

145. Ibid, at 84. The report also says (at 90): "For those sex criminals who are not curable because we lack the methods, the personnel, and the institutional resources, there is no greater justification for the completely indeterminate sentence than there is for other categories of felons. If our purpose be to extend the unproductive confinement of sex deviates, we should do so frankly by the direct establishment of longer sentences, not indirectly through futile pretence at psychotherapeutic or medical treatment that is in fact non-existent". A rather different idea was put forward in an authoritative British report at the time of the McRuer report. In Sexual Offences: A Report of the Cambridge Department of Criminal Science, (London: MacMillan, 1957), we find the following statement about the treatment of sexual offenders (at 435): "This is a highly controversial subject and one in which much has been said and written, some of it without any foundation other than guess-work and an obstinate belief that sexual offenders as they appear in courts, are

'different', are 'recidivists', and can only be helped by extensive psychiatric treatment".

146. See Mohr, Turner, and Jerry, Exhibitionism and Pedophilia (Toronto: University of Toronto Press, 1964). The authors found that the recidvism rate for first offenders was only ten percent. They found that it was 33% for persons with more than one offence and 55% for individuals with a history of both sexual and non-sexual offences. See also note 113, supra.

147. The matter of 'motivation' was raised repeatedly in our discussions with treatment staff at the RPC in Abbotsford and RTC in Kingston Penitentiary. It is hard for individuals to identify themselves as sex offenders especially in prison. This much said there was some optimism that, once exposed to treatment, good effects can "rub off". The operation of these units is, however, very complex. Some staff members have great difficulty in accepting what their charges have done. As well, they have to be able to absorb a good deal of aggression. At Abbotsford about one-third fail the programme (or, as one member of staff was quick to point out, "the programme fails them"). One of the biggest difficulties is the absence of a gradual release programme and the opportunity, as one staff person put it, "to teach those around the offender". The difficulty is that when progress is made in group work there is little chance to put that work to the test. As one staff member said: "There are no guarantees, but that, unfortunately, is what the public wants". It should not necessarily be thought that court-remanded sex offender patients cannot be treated. See, for example, Maletzky who has shown that such patients, when treated with covert sensitization fared just as positively as self-referred patients. Although it is possible that the successes in the court-referred group might have been due in part to the fact that staff "might have tended to issue more favorable reports for the court-referred group out of a hesitancy to involve these patients in deeper trouble", the finding nonetheless merits closer observation. In "Self-Referred versus Court-Referred Sexually Deviant Patients: Success with Assisted Covert Sensitization", 11 Behav. Ther. 306 (1980) at 313.

148. Freund, Sedlacek, and Knob, "A Simple Transducer for Mechanical Plethysmography of the Male Genital." 8 J. of the Exptl. Anal. Behav. (1965) at 169-70.

149. Note 140, supra.

150. Although Freund notes : "Considering the demonstrated ability of subjects to manipulate phallometric test results, together with the motivation of many of those who undergo treatments for anomalous erotic preference, one should not be too optimistic about phallometric test methods as a means of validating positive therapeutic effects". "Assessment of Pedophilia", in Cook and Howells (eds.) note 141, supra, at 166.

151. Abel et al. "Identifying Dangerous Child Molesters", in Stuart (ed.) Violent Behavior. (New York: Brunner/Mazel, 1981) at 116-137.

152. Phallometric assessment plays a key part in the routine assessment of sex offenders at the Regional Treatment Centre at Kingston Penitentiary.

153. Haward, note 2, supra.

154. Langevin, note 140, supra at 62.

155. Chapter 1, note 7, supra.

156. Langevin, note 140, supra at 65.

157. Ibid, at 64.

158. Ibid, at 65 (though see note 147 supra which, however, does not refer to very serious offenders).

159. Surely Schiffer is correct in his recent observation: "It is submitted that any legal system in which mental disorder remains a partial justification for the detention of some individuals has an obligation to provide them with treatment." in Psychiatry Behind Bars, (Toronto: Butterworths, 1982) at 221.

160. Although in fact there is some evidence from California to suggest that when a sufficiently aggressive treatment programme is applied to properly motivated sex offenders they can be freed earlier than would have been the case had they served a set term. See Konecni, Malcahy and Ebbesen, note 50, supra at 87-124.

161. See West et al., Chapter 1, note 9, supra at 151. See also West, Chapter 1, note 14, supra at 147.

162. Langevin, note 140, supra at 21.

163. In a powerfully worded account of the Californian experience with Mentally Disordered Sex Offender statutes, Oliver has recently commented: "The legal, medical and social foundations for the MDSO legislation - hence its very justification - rested on the assertion that sexual offences are the expression of identifiable mental disturbance for which psychiatry has effective remedies... These contentions, though of a scientific nature and readily subject to empirical validation, have never been substantiated... No matter how socially desirable in intent, laws promulgated on the basis of faulty scientific premise are likely to be discredited in the course of their implementation. As a recognized professional body within medical science, psychiatry has an obligation to involve itself in the legislative process and to educate governments as to the limits of psychiatry's capabilities rather than to extol its efficacy." In "The Sex Offender: Lessons from the California Experience" 5 Int. J. Law Psychiat 403 (1982) at 406.

164. West, Chapter 1, note 14, supra at 144 covers the point well in his essay "Treatment in Theory and Practice". Our point is not that there is no need for mental health services so far as the treatment of sex offenders is concerned. Obviously, this would be an absurd position to take. At the same time though, we wish to avoid the idea that because sexual deviation is involved in a case, extensive psychiatric and other mental health opinion is automatically required. Perhaps the point has been best expressed by Howells when he reminds us that: "...psychologists and psychiatrists are particularly prone to the malady 'furor therapeuticus' when they concern themselves with sex offenders. The rush to 'treat' sexual offenders may not be rationally based if it stems from assumptions of mental abnormality being present in this group" (Chapter 1, note 14, supra at 29).

165. Langevin, note 140, supra at 21.

166. One psychiatrist, Dr. Russel Fleming, who has testified in more Dangerous Offender hearings than any other of his Canadian colleagues, has gone on record arguing that psychiatry should have no part of this. The following appeared in an article in the Globe and Mail dated Feb. 9th, 1982: "The courts should stop foisting the question on psychiatrists and instead make the dangerous offender designation automatic if a crime is repeated a certain number of times...." Elsewhere in the article he is quoted as saying the courts "...shouldn't ask us to get involved in this adversarial nonsense where a Crown Attorney shops around for a right-wing psychiatrist to say why the man should go (to an institution), while the defense shops around for a left-wing psychiatrist to say he shouldn't". The results of the Hillen-Webster Ad Hoc Interview study were clear in showing that the preponderance of the 20 psychiatrists interviewed did not think that psychiatric testimony should be required under Part XXI.

167. For a discussion of this distinction see Keehn and Webster "Behavior Therapy and Behavior Modification" 10 Canad. Psychol. 68 (1969).

168. Langevin, note 140, supra at 53.

169. See "Sexual Aggression: Studies of Offenders against Women" (in submission) at 57. We thank Dr. Quinsey for supplying this report to us.

170. Note 140, supra at 58. See also a strongly worded editorial by Seymour Halleck, "The Ethics of Antiandrogen Therapy" 138 Amer. J. Psychiat. 642 (1982). He is worried about the unknown long- term medical effects of the antiandrogens. As well, he is concerned about the extent to which use of these drugs may become widespread. Perhaps most importantly he raises the issue of voluntariness as it relates to incarcerated sex offenders. Can an imprisoned person struggling to gain release make a voluntary, informed and competent decision not to take the drug? Bancroft makes similar points in his Human Sexuality and its Problems (Edinburgh: Churchill Livingstone, 1983) at 431.

171. A somewhat different view is on record. Recently Berlin and Meinecke reported provera to be an effective and reversible treatment. Only 3 of 20 chronic patients relapsed while taking the drug whereas 10 of 11 patients relapsed after having stopped taking the drug 'against medical advice'. See "Treatment of sex offenders with antiandrogen medication: Conceptualization, review of treatment modalities, and preliminary findings" 138 Am. J. Psychiat. (1981). Interesting though these observations may be, however, the study is scientifically deficient.

172. Langevin, note 145, supra at 58.

173. Ibid, at 59.

174. Ibid, at 59.

175. Bancroft, note 170 at 431.

176. Researchers at the Clarke Institute have such a double blind study in progress.

177. A sensational report recently appeared in the Toronto Star on March 3, 1983. A 32-year old mother of a 7 year old daughter shot a man to death in a courtroom as he was being tried for killing the girl. The man had previously undergone castration but court authorities had allowed him to take sex hormones to restore his sexual drive. Although this is an almost bizarre case, it does point up the fact that castration per se is not necessarily a permanent solution for the prevention of sex-initiated violence.

178. Langevin, note 145, supra at 60. The reader should, however, note that a somewhat different view has recently been put forward by Freund in his review of Stürup's work. He suggests that castration was effective in reducing recidivism rates of patients classified as "...mentally defective sex offenders, but not successful in schizophrenic sex offenders. Stürup also found that, contrary to what is true for other criminal offenders, recidivism does not diminish with age" (emphasis in original) at 16. This observation, that pedophilic sex offenders may continue their practices even as they get older, is obviously important to the present report. If it is true, then there is no really safe age at which these offenders can be reintegrated into society and it offers some support for surgery for some offenders. That is, castration may be the only solution other than permanent retention in prison or hospital. Freund argues that serious recidivism could be more or less abolished by castration if (1) it is used on nonpsychotic persons; (2) a sufficient period of time is imposed between surgery and release into the community; (3) there is a high degree of voluntariness of consent; and (4) the person is carefully monitored mentally and physically before and after the intervention. Generally, Freund concedes that there are health hazards associated with castration but argues that these can be minimized if managed properly. "Therapeutic Sex Drive Reduction", Acta Psychiatrica Scandinavica Supplementum 287 (62) at 5.

179. Langevin, note 140 at 61.

180. Eysenck, Chapter 1, note 11, supra.

181. The issue of assessment of therapeutic effect is further clouded by "...the mere fact of a traumatic appearance before a court or the publication of one's name in a local newspaper" (Freund, note 157, supra at 165). In other words it seems likely that such publication will itself have some 'remedial' effect and without proper control measures it becomes impossible to ascribe positive changes to clinical intervention.

182. Garfield and Bergin (eds.), Handbook of Psychotherapy and Behavior Change, 2nd Ed., (New York: Wiley, 1978).

183. Truax and Carkhuff, Towards Effective Counseling and Psychotherapy: Training and Practice (Chicago: Aldine, 1967).

184. Gerson and Bassuk, "Psychiatric Emergencies: An Overview" 137 Am. J. Psychiat. 1 (1980).

185. Smith et al., note 1, supra.

186. Langevin, note 140, supra at 132.

187. Ibid, at 293.

188. Ibid, at 417-418.

189. Ibid, at 444-447.

190. Ibid, at 417-418.

191. Quinsey, note 169, supra at 53-54.

192. West makes this point very well when he says: "The ideal comparison is between some highly specific interaction and no intervention at all, but all too often the so-called treatment consists of a relatively minor modification of existing approaches, so that the contrast between the treatment and control groups is too slight to make much difference. This is particularly likely to happen in treatment schemes carried out in institutions where the traditional regime is so pervasive that it overpowers all attempts to introduce counteracting influences". (Unpublished manuscript entitled "Criminology under attack" delivered as a lecture to the April 1983 University of Toronto, Department of Psychiatry, conference on "Clinical Criminology: Current Concepts").

193. Dickens, "Sexual Aggression and the Law: Implications for the Future" In Sexual Aggression and the Law Verdun-Jones and Keltner (eds.) Vancouver: Criminology Research Centre, Simon Fraser University, 1983 at p. 67. That some mistakes will be made with such gradual release is beyond dispute. In that same article it was put as follows: "Unfortunately, however, adequate security cannot be total security; failures may occur which victimize, and perhaps cost the lives of, the innocent. This discloses the public and political dimensions of treatment release programs for aggressive sex offenders and the degree to which such programs must have not only the courage to proceed, but also the courage to fail" (p. 67).

194. West, note 192, supra says: "Another common defect of institutional treatment schemes in that they so often cease just when they are needed, that is at the moment of release into the community when the offender has to face once again the situations that provoke law-breaking".

195. One of the authors (C.D.W.) was at some pains to gain experience through testifying in a dangerous offender hearing. The testimony, which was on the limits of psychiatric ability to predict future dangerous behaviour, was in effect based on Chapter 2 of the present report.

196. Such a study would be difficult to execute in practice. With so few cases having arisen over the past six years, not many lawyers and forensic psychiatrists have had much experience with Part XXI. A random sampling of, say, Crown Attorneys, might not yield much interest since, for many, the provisions will not be of much real use.

197. This aspect of the project as a whole should not be minimized. Although this study was not included in our terms of reference, it did a good deal to help focus interest in issues arising from Part XXI. Several participants spoke to us at great length and put themselves to considerable inconvenience in order to accomodate us.

198. Our interviews with Crown Attornies were restricted in scope. We did not deal with policy issues.

199. Almost everyone who opted for modification of Part XXI wanted to see an increase in frequency of review. Yet, and this points out the kinds of complexities we found as we conducted our interviews, one member of the legal group was against this. If there is to be a Part XXI, he suggested, then the release reviews should be as currently stipulated. His point, borne of no small amount of experience, is that the frequency of reviews would merely serve to get the men's hopes up only to have them dashed. In other words, he saw this from the reality of the confined inmate. It shows that although most people gave the 'right' answer, a single opinion on the other side shows even humanitarian questions like this to be very hard to deal with.

200. This is in fact a replication of a previous more thorough study of ours - see Menzies, Webster and Butler, 22 Comp. Psychiat. 387 (1981). In that study we invited Canadian forensic psychiatrists to rank order 10 variables which might be expected to contribute to the assessment of a patient's dangerousness. Three of the top four variables were related to present and past offences. We said: "In general, the most striking feature of this rank-ordering is the predominance of 'legal-judicial' criteria over 'medical-epidomiological' factors. If forensic psychiatrists are implicitly or explicitly employing the same determinants for assessing potential dangerousness as judicial personnel, there may be profound ramifications regarding the rationale for employing clinicians to render these decisions" (at 392).

Chapter 3

Dangerous Offenders: Legal Issues

> "You're wrong there, at any rate," said the Queen: "were you ever punished?"
>
> "Only for faults," said Alice.
>
> "And you were all the better for it, I know!" the Queen said triumphantly.
>
> "Yes, but then I had done the things I was punished for," said Alice: "that makes all the difference."
>
> "But if you hadn't done them," the Queen said, "that would have been better still; better, and better, and better!"
>
> (Lewis Carroll, Alice in Wonderland)

3:1 Current Dangerous Offender Provisions: Criminal Code Part XXI

Part XXI of the Criminal Code[1] provides for the imposition of a sentence of indeterminate detention in a penitentiary pursuant on a finding that a person is a "Dangerous Offender".[2] The Offender must have been convicted of a "serious personal injury offence,"[3] and a special application must be made for a court[4] to order the indeterminate sentence in lieu of any other sentence that might be imposed for the offence in question.[5]

Two categories of serious personal injury offences are defined in the Code. These are:

> (a) an indictable offence (other than high treason, treason, first degree murder or second degree murder) involving
>
> (i) the use or attempted use of violence against another person, or
>
> (ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage upon another person,
>
> and for which the offender may be sentenced to imprisonment for ten years or more, or
>
> (b) an offence or attempt to commit an offence mentioned in section 246.1 (sexual assault), 246.2 (sexual assault with a weapon, to a third party or causing bodily harm) or 246.3 (aggravated sexual assault).[6]

Different criteria for a finding that a person is a Dangerous Offender exist in respect of each of these two categories. With regard to category (a) offences, the court must be satisfied that:

> the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on

> the basis of evidence establishing
> (i) a pattern of repetitive behaviour by the offender, of which the offence for which he has been convicted forms a part, showing a failure to restrain his behaviour and a likelihood of his causing death or injury to other persons, or inflicting severe psychological damage upon other persons, through failure in the future to restrain his behaviour,
> (ii) a pattern of persistent aggressive behaviour by the offender, of which the offence for which he has been convicted forms a part, showing a substantial degree of indifference on the part of the offender as to the reasonably foreseeable consequences to other persons of his behaviour, or
> (iii) any behaviour by the offender, associated with the offence for which he has been convicted, that is of such a brutal nature as to compel the conclusion that his behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint.[7]

For category (b) offenders it must be shown that:

> the offender, by his conduct in any sexual matter including that involved in the commission of the offence for which he has been convicted, has shown a failure to control his sexual impulses and a likelihood of his causing injury, pain or other evil to other persons through failure in the future to control his sexual impulses...[8]

The Provincial Attorney General must consent to the application for a hearing,[9] and at least seven days' notice must be given to the accused.[10] Provision is also made in Part XXI for the court to order the offender to attend an examination or be remanded in custody for observation.[11] The offender should normally be present at the hearing of an application,[12] and the trial is held before a court sitting without a jury.[13]

At the trial, the court is required to "hear the evidence of at least two psychiatrists and all other evidence that, in its opinion, is relevant, including the evidence of any psychologist or criminologist called as a witness by the prosecution or the offender".[14] Each side is to nominate one of the psychiatrists who must be heard by the court[15] and if the offender fails or refuses to nominate a psychiatrist, one will be appointed by the court to speak on his behalf.[16] Character evidence may also be admitted on the issue of dangerousness "if the court thinks fit," and can be introduced by the offender as of right.[17]

If the court finds the offender to be a Dangerous Offender, full details of the hearing must be disclosed to the Solicitor General of Canada, including copies of all expert reports or testimony.[18] An offender can appeal against a sentence of indeterminate detention on any ground of law or fact (or mixed law and fact),[19] while the Attorney General can only appeal against the dismissal of an application on a matter of law.[20] Finally, provision is made for a parole review after the

first three years in custody, and "not later than every two years thereafter".[21]

3:2 The Legal Tensions Inherent in Part XXI

The provisions of Part XXI are not often invoked. An averaging of the total number of offenders who have been declared Dangerous Offenders during the six years in which the present legislation has been operative, produces a figure of less than half-a-dozen per year.[22] This infrequency in the use of Part XXI, together with the general availability under specific sections of the Code of broad sentencing options for serious offences of violence, might indicate that there is little need in Canada for any special provisions to deal with "Dangerous Offenders".

However, the definition of "serious personal injury offence" in section 687 of the Code is sufficiently expansive to take in not only offences carrying a maximum sentences ranging from five years (gross indecency) to life imprisonment (aggravated sexual assault)[23] but also offenders with a history of similar convictions[24] or only one conviction deemed to be part of a "pattern of repetitive behaviour" related to the single conviction, or a "pattern of persistent aggressive behaviour" or behaviour deemed to be "brutal" in nature.[25] In practice the finding that a person is a Dangerous Offender may result in the imposition of a far more severe sentence than would otherwise have been possible. Clearly then the predictive element in a Part XXI hearing is of critical significance. Moreover, the role of psychiatrists and other expert witnesses who provide the courts with the necessary predictive "evidence" is central to the Dangerous Offender process as it is currently constituted.

Yet, as has been demonstrated elsewhere in this report, not only is the attempt by anyone to predict the dangerousness of specific individuals a highly speculative business, but the traditional "experts" at the task, psychiatrists and psychologists, have recently gone to considerable lengths to disclaim their hitherto presumed expertise in such matters.[26] A possible consequence of this declared inability to predict future behaviour may be that the rationale of the present Canadian Dangerous Offender provisions has been largely undercut. The procedure of Part XXI is clearly built upon the assumptions that specific individuals are "dangerous", and by implication others are "safe", and that it is possible to ascertain judicially into which category a given offender falls. In reality, it is now generally accepted in the scientific literature that dangerousness can only be predicted on a probabilistic basis. Thus, while it might be reasonable for a court to find that a given offender falls within perhaps a high rather than a low risk group with regard to future dangerousness, a court should not purport to declare unequivocally that the offender will actually be dangerous if not detained indefinitely.

Apart from the serious ethical question of whether indeterminate detention for dangerousness can be ethically justified where it is based on a probabilistic rather than a specific prediction, there can be little doubt that Part XXI now lacks coherence legally. The following legal issues must be addressed in the light of what is now known about the fundamental contingency of dangerousness predictions.

First, what evidence should be admissible in a trial to determine dangerousness and what role, if any, should "expert witnesses" be permitted to play in such a hearing? Secondly, what standard of proof should the prosecution be required to satisfy before a court can impose the "Dangerous Offender" label on an individual? Thirdly, what is the likely impact on this whole area of the Canadian Charter of Rights and Freedoms?

3:3 The Admissibility and weight of evidence as to future dangerousness

The status of dangerousness prediction as a scientific technique

The requirement in section 690 of the Code that at least two psychiatrists give evidence on the issue of future dangerousness suggests that the clinical prediction of dangerous behaviour is a reputable scientific technique, the results of which should be given special weight as expert evidence. Yet arguably the clinical prediction of dangerousness is not, and probably never has been, a reputable scientific technique. Accordingly, it may be that the testimony of clinicians on the matter should be either entirely excluded as being unreliable and misleading, or at least afforded considerably less weight than at present.

The most widely used test for determining the admissibility of a particular scientific method or technique dates back sixty years to the case of Frye v. U.S.[27] In Frye, the court had to evaluate a lie-detector test which essentially consisted of an analysis of fluctuations in systolic blood pressure. In ruling the results of the test inadmissible, the court stated that the technique had "not yet gained such standing and scientific recognition...as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made".[28] More generally, Van Orsdel, A.J. commented:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidentiary force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field to which it belongs.[29]

This so-called "Frye test," which has been widely applied by American courts, has also been cited with approval in Canada.[30]

How do expert predictions of dangerousness measure up to this standard? While claims of predictive skill were being made by clinicians at one time,[31] there can be little doubt that the relevant scientific community now denies possession of the ability to forecast accurately dangerous behaviour on an individual basis.[32] Such predictions probably never even entered the "twilight zone" of the Frye test.

In the 1976 case of Tarasoff v. Regents of the University of California[33] the issue of predictive expertise arose in the context of the civil liability of mental health professionals who diagnose patients as being dangerous yet fail to warn subsequent victims. Tobriner J. summarized the cause of action in the case as follows:

> On October 27, 1969, Prosenjit Poddar killed Tatiana Tarasoff.... Plaintiffs, Tatiana's parents, allege that two months earlier Poddar confided his intention to kill Tatiana to Dr. Lawrence Moore, a psychologist employed by the Cowell Memorial Hospital at the University of California at Berkely. They allege that on Moore's request, the campus police briefly detained Poddar, but released him when he appeared rational. They further claim that Dr. Harvey Powelson, Moore's superior, then directed that no further action be taken to detain Poddar. No one warned plaintiffs of Tatiana's peril.[34]

In an effort to escape liability for the failure to warn, the defendant therapists claimed, inter alia, that "imposition of a duty to exercise reasonable care to protect third persons is unworkable because therapists cannot accurately predict whether or not a patient will resort to violence".[35] In support of this contention, the American Psychiatric Association submitted an amicus curiae brief citing "numerous articles which indicate that therapists, in the present state of the art, are unable to reliably predict violent acts; their forecasts, amicus claims, tend consistently to overpredict violence, and indeed are more often wrong than right."[36] Here then, an authoritative voice for the "relevant scientific community" has stated publicly that the "present state of the art" of prediction is so primitive that assessments are usually incorrect.

While it did not dispute this professed incompetence of mental health professionals to make consistently reliable clinical predictions of dangerousness, the Supreme Court of California nevertheless found the defendants liable for the failure to warn, since on the facts an accurate prediction had actually been made.[37] For the purposes of this report, however, the question of civil liability is not important. What is significant is that by the time the Tarasoff appeal had been heard in 1976, "organized psychiatry had come officially to deny possession of a professional skill accurately to predict individual dangerousness."[38] The implications of this denial for the continuing role of psychiatrists, and any other supposed "expert" witnesses, in Dangerous Offender hearings will now be considered.

Psychiatrists as Expert Witnesses in Dangerous Offender Hearings

In Anglo-Canadian evidence law it has long been established that an "opinion," that is "any inference from observed facts,"[39] is prima facia inadmissible in evidence. The rationale for this rule is that a witness should merely state facts, leaving the drawing of inferences to the judge or jury.[40]

A recognized exception to this general exclusionary rule is that an

"expert" in a particular field may give opinion evidence on a matter falling within that field. Before admitting such evidence, a court must be satisfied of two things. First, that the witness is indeed competent as an expert,[41] and secondly that the matter on which he testifies "is likely to be outside the experience and knowledge of a judge or jury".[42] Yet even when such evidence is admitted, the function of the expert is not generally to draw final conclusions from the facts, but rather:

> to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence.[43]

Admittedly, the distinction between matters of fact and opinion will often be a fine one, but in general an expert should not give evidence in such a way as to usurp the function of the court as trier of fact.[44]

The need for caution in admitting expert evidence stems from the fact that such testimony may be persuasive on the court to an unwarranted degree. As Lawton L.J. observed in R. v. Turner:

> If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary. In such a case if it is given dressed up in scientific jargon it may make judgment more difficult. The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves; but there is a danger that they may think it does.[45]

In the specific field of dangerousness predictions, the 1969 Report of the Canadian Committee on Corrections (The Ouimet Report[46]) noted the apparent over-reliance on unreliable psychiatric testimony in hearings under the former Dangerous Sexual Offender provisions. The Committee was "gravely concerned that the present law permits a determination upon such an inadequate basis, with the resulting consequence that an indeterminate sentence must be imposed."[47] Unfortunately, this grave concern did not prevent the introduction of the present Dangerous Offender provisions under which psychiatric testimony continues to be the cornerstone of the indeterminate sentencing process.

Should Psychiatric Testimony be Excluded?

In view of the current uncertainty surrounding predictions of individual dangerousness, a revision of the evidentiary provisions of Part XXI of the Code seems to be a logical necessity. Two obvious possibilities exist. On the one hand, an argument can be advanced that current clinical techniques of predicting future violence are so unreliable that they convincingly fail the Frye test for the admissibility of scientific evidence. Accordingly, the evidence of mental health professionals on the issue of future dangerousness should be entirely

excluded. On the other hand, psychiatric assessments of dangerousness, though far from perfect, may still be of some use to the court: a weak prediction may be better than no prediction at all.

This second possibility may however be subject to a serious ethical objection. For the false positives (i.e. offenders who are wrongly declared to be dangerous) the admission in evidence of an incorrect psychiatric assessment may have extremely serious consequences in terms of deprivation of civil liberties.[48] Should not such testimony be excluded entirely because of this risk? The answer to this question depends largely upon the broader justification which is advanced for preventive detention in the first place.

As Nigel Walker has noted, those who oppose preventive detention, the "anti-protectionists," seem to be armed with "irresistible arithmetic" when they demonstrate that "a period of custody, or an extension of custody, which is imposed solely in order to protect others against violence will be unnecessarily imposed in the majority of cases."[49] Walker argues, however, that even if the arithmetic is indeed correct, that does not mean that it will necessarily be "morally wrong" to mistakenly confine a person who is incorrectly labelled as a future perpetrator of violence. Such a simplistic deduction would, he suggests, require that some dubious assumptions be made:

> The anti-protectionist is using two neat rhetorical tricks at once. By referring to mistaken detentions and mistaken releases simply as "mistakes," he is implying that they all count the same; and by glossing over the differences between "regrettable" and "morally wrong," he is implying that it is our moral duty to go for the smallest number of mistakes irrespective of their nature.[50]

Walker argues that, on the contrary, it might be quite reasonable to detain three men "who have done serious violence to more or less innocent victims,"[51] even though on an actuarial basis only one will be violent if released. The reason is simply that it is not necessarily appropriate to balance "false positives" against "false negatives" on a strictly pro rata basis. In terms of consequences they are probably quite different. Thus while it is clearly "regrettable" that the selection of offenders for preventive detention should proceed on such an imprecise basis, this may nevertheless still represent a lesser of two evils.

If this general argument can be accepted, then the "lesser of two evils" principle can be extended to cover the question of the admissibility of unreliable evidence in a Dangerous Offender hearing. Thus it may after all be appropriate for a court to hear the opinion evidence of mental health professionals on the issue of future dangerousness, since, unreliable though it is, such evidence may still be better than no guidance at all. As Dix has argued, "under an approach stressing relevancy, the fact that opinion evidence is based upon probability rather than certainty does not justify its exclusion."[52]

Two strong caveats must however be stated immediately. First, courts should in each case evaluate critically any such opinion evidence and

should not hesitate to reject it completely where a prediction of future violence has clearly been made on an insubstantial basis. Secondly, if a court decides to admit a prediction because it is satisfied that an assessment has been made in a sufficiently thorough and objective manner, the court should still take into account the general inaccuracy of predictions in deciding what weight to place on the evidence.[53]

Depending on what criteria are adopted by the courts in evaluating psychiatric testimony,[54] it may well be that few predictions will pass the test of admissibility in the first place. Even predictions that do pass the test must then be critically examined in order to determine what evidentiary weight should be attached to them.

Recent Developments in the United States

Over 100 American decisions in which the Tarasoff case has been cited have been reviewed. Many of these cases have focused only on the tortious liability of therapists and others who fail to warn of impending danger. However, mental health professionals' disclaimers about their own predictive expertise and defendants' objections to the use against themselves of manifestly unreliable methods of predicting future behaviour, have forced the courts to tackle the implicaitons of Tarasoff for criminal sentencing procedures which rely in whole or part on predictions of future violence. After an initial refusal to face up to the damage which Tarasoff has inflicted on the credibility of such testimony, there are now indications that American courts are becoming more critical and realistic in their evaluations of "expert" predictions.

Expert predictions of dangerousness are used by American courts in civil commitment hearings, as part of ordinary criminal sentencing, and in capital sentencing trials. Not surprisingly, it is the last of these which is the most controversial since "incorrect predictions are irreversibly unfair to 'false positives'.'[55] Nevertheless, courts have continued to call on psychiatrists to advise them on the issue of a defendant's propensity to commit further acts of violence. In Texas, for example, where a finding of future dangerousness is a prerequisite to the imposition of the death penalty, one psychiatrist, Dr. James Grigson, has personally testified in over seventy capital sentencing trials. In all but one of these cases the response of the courts has been to sentence the defendant to death. The media have aptly nicknamed Grigson "Dr. Death".[56]

Recently, a growing number of voices have been raised against the uncritical acceptance of the testimony of such "experts." Some have called for a total ban on the use of expert predictions of dangerousness in capital cases. This ban could either be imposed by the courts for evidentiary reasons,[57] or be self-imposed by the medical community on an ethical basis.[58] No court in the United States has yet ruled that expert evidence as to future dangerousness should be totally excluded from capital sentencing hearings. Recently, however, a series of challenges to the Texan and Californian capital sentencing procedures has forced courts to reconsider the unquestioning reliance which has for so long been placed on psychiatric predictions of violent behaviour.

In 1976, the U.S. Supreme court rejected a challenge to the

constitutionality of the Texas capital sentencing procedure in the case of Jurek v. Texas.[59] In Texas, if a person is convicted of one of five types of murder, he or she then faces a separate sentencing hearing at which it is decided whether the death penalty should be imposed.[60] If the jury at this hearing answers two questions in the affirmative, together with a third if raised by the evidence, then the judge must impose the death sentence. The three questions are:

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.[61]

In Jurek, the petitioner argued that the second of these statutory questions was unconstitutional as "it is impossible to predict future behavior and...the question is so vague as to be meaningless."[62] The Supreme Court responded as follows:

> It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. For those sentenced to prison, these same predictions must be made by parole authorities. The task that a Texas jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice. What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. Texas law clearly assumes that all such evidence will be adduced.[63]

There are two obvious objections to this line of reasoning. The first, which has already been mentioned, is that, in terms of consequences at least, the decision to execute an offender is quite unlike the other predictive decisions which are made by courts on a daily basis. The second is that there should surely be some controls on the quality of apparently "relevant" evidence which can be adduced, and also on the means by which such evidence is obtained.

Yet in the 1980 case of Barefoot v. State,[64] the Texas appeals court reaffirmed its position that relevance, almost regardless of quality, was to be the test for determining the admissibility of psychiatric testimony in capital sentencing proceedings. At the trial, Dr. Grigson, and another psychiatrist, Dr. Holbrook, gave evidence that in their opinion the defendant would "probably commit future acts of violence that would constitute a continuing threat to society".[65] Neither psychiatrist had personally examined the defendant. Rather, they were each given a hypothetical question based on the facts of the case as proved at trial and were asked to assess the future dangerousness of the defendant accordingly.[66] The appeals court dismissed the defendant's objection to this procedure, and held that the fact "[t]hat the experts had not examined [the defendant] went to the weight of their testimony, not to its admissibility."[67]

In response to the defendant's more general argument that "psychiatrists, as a group, are not qualified by education or training to predict future behavior,"[68] the court stated:

> This Court is well aware that the ability of psychiatrists to predict future behavior is the subject of widespread debate. However, we are not inclined to alter our previously stated view that a trial court may admit for whatever value it may have to a jury psychiatric testimony concerning the defendant's future behavior at the punishment stage of a capital murder trial.[69]

This case was heard by the U.S. Supreme Court and a decision was rendered on July 6, 1983.[70] The American Psychiatric Association (APA) had again stepped in as amicus curiae and had stated forcefully that "[t]he inadequate procedures used in this case allow a psychiatrist to masquerade his personal preferences as 'medical' views, without providing a meaningful basis for rebutting his conclusions" and that "[p]sychiatric predictions of violent conduct unduly facilitate a jury's finding of future dangerousness by providing a clinical explanation for what is, at best, only an assessment of statistical probabilities."[71]

The timing appeared appropriate for the Supreme Court to use the Barefoot case as a basis for clamping down on the use of psychiatric testimony in capital sentencing proceedings. Two other recent decisions have paved the way for such a move. In one of these cases, the U.S. Supreme Court has already indicated its concern at the general lack of due process safeguards in this area. Estelle v. Smith[72] concerned another of Dr. Grigson's confident predictions of dangerousness, this time based on a ninety minute interview with the defendant. The 5th Circuit vacated Smith's death sentence and the U.S. Supreme Court affirmed. The manner in which Grigson had conducted his interview was held to violate both the defendant's fifth amendment right against self-incrimination and his sixth amendment right to counsel.[73]

In addition to its own ruling on procedural safeguards in Estelle v. Smith, the U.S. Supreme Court almost certainly looked closely at a recent ruling of the Supreme Court of California which deals with the substantive

question of the underlying reliability of expert predictions. California, like Texas, has a bifurcated trial procedure in certain murder cases. In People v. Murtishaw,[74] a psychopharmacologist called by the prosecution to testify in a penalty trial stated, inter alia, that in a prison setting the defendant would "continue to be a violent assaultive and combative individual."[75] The Supreme Court of California ruled that the admission by the trial court of this testimony constituted reversible error for the following reasons:

> (1) expert predictions that persons will commit future acts of violence are unreliable, and frequently erroneous;
> (2) forecasts of future violence have little relevance to any of the factors which the jury must consider in determining whether to impose the death penalty;
> (3) such forecasts, despite their unreliability and doubtful relevance, may be extremely prejudicial to the defendant.[76]

In support of the first of these reasons, the court referred to "numerous studies" which "have demonstrated the inaccuracy of attempts to forecast future violent behavior,"[77] and quoted from review articles by Ennis and Litwack,[78] Cocozza and Steadman[79] and others. With regard to the second reason, the court noted that the specific wording of the California penalty statute did not require a determination of the likelihood of future dangerousness. Indeed it held that "such a determination is at best only marginally relevant to the task at hand."[80]

Regarding the third point, prejudice to the defendant, the court returned to the balancing test it had devised in the Tarasoff case:

> ...in Tarasoff we balanced the "uncertain and conjectural" harm to the patient against the mortal risk to the potential victim, and concluded that the therapist should act on the basis of his prediction, unreliable though it may be. That same balancing process in the present context yields a far different result. There is nothing speculative about the harm to defendant, who faces not merely a risk of short-term incarceration but of execution. What is uncertain and conjectural is whether defendant, if imprisoned for life, will at some uncertain future date assault some yet unidentified victim. The calculus of risk which called for acting despite uncertainty in the Tarasoff setting does not justify executing a defendant to avoid improbable and speculative danger.[81]

Despite this strong statment, however, the court did not impose an absolute rule excluding all expert predictions as to future dangerousness in capital cases. Rather, it stated that "it may be possible for a party in a particular case to show that a reliable prediction is possible"[82] and gave two examples of situations in which such evidence might be admissible:

> A more reliable forecast...might be possible if the psychiatrist had established a close, long-term relationship with defendant that gives him a greater understanding of defendant's behavior than can usually be attained in brief, often adversary, pretrial interviews. A reliable prediction might also be conceivable if the defendant had exhibited a long-continued pattern of criminal violence such that any knowledge psychiatrist would anticipate future violence.[83]

In the present case Dr. Siegal, the pharmacologist, only examined Murtishaw once, and did so largely to determine whether the defendant had acted under the influence of drugs. Moreover, Siegal "had no established and close relationship with defendant on which to base his prediction", and the "asserted past violent acts were few and relatively trivial".[84] Accordingly the court concluded that it had "no reason to believe that Siegal's prediction was immune from the general unreliability which attends predictions of future violence generally".[85]

The United States Supreme Court did not choose to apply a Murtishaw type test in the Barefoot appeal. If it had done so, the evidence of Drs. Grigson and Holbrook may well have been rejected. Neither had personally examined or evaluated the defendant at all prior to expressing his opinion on the dangerousness issue, although it is possible that a "long-continued pattern of criminal violence" could be demonstrated.

There are as yet no indications that the American courts will adopt a Murtishaw type test in contexts other than capital sentencing. A 1980 ruling of a California district appeal court in People v. Henderson[86] established that relevance and not reliability is the test for the admissibility of expert evidence as to future dangerousness in a mentally disordered sex offender hearing. In Murtishaw, the Supreme Court of California referred to the Henderson case and distinguished it both on the express ground that in Henderson the trier of fact was required by statute to determine whether a person is dangerous,[87] and also simply because the death penalty is qualitatively different from an extended term of commitment.[88]

Similarly, in the 1982 case of People v. Bennett,[89] a different Californian district appeal court ruled that opinions of psychiatrists and other mental health professionals had been properly admitted in a hearing to recommit a defendant found not guilty by reason of insanity. The court referred to the application of the Tarasoff balancing test in the Martishaw case and concluded that:

> In the context of a petition for an extension of commitment...a finding on whether the individual is dangerous to others because of mental illness is essential. Testimony by mental health experts in this context will often be the only way to establish whether such dangerousness exists.[90]

Once again the consequential difference between extended commitment and capital punishment seems to have tipped the scales in favour of

admissibility.

Implications for the Use of Experts in Canadian Dangerous Offender Hearings

What are the implications of these recent American decisions for the continued use of experts in dangerous offender hearings in Canada? The rulings of courts in the United States obviously set no binding precedents for Canadian courts. Moreover, most of the cases just discussed do not even deal with situations which are directly analogous to the dangerous offender provisions of the Canadian Criminal Code. Nevertheless, these American cases may be immensely valuable in highlighting the most important implications for predictive sentencing procedures of the professed inability of mental health professionals to forecast accurately individual dangerousness.

It is worth returning to Walker's argument that some overprediction in dangerousness hearings may be justifiable in view of the considerable difference between false positives and false negatives in terms of potential consequences.[91] In recently drawing a distinction between capital sentencing and other predictive exercises, some American courts seem at last to be facing up realistically to the respective consequences for the offender and for his potential victims of admitting expert predictions of dangerousness. Thus, the Murtishaw court excluded psychiatric testimony precisely because of the ultimate nature of the death penalty. On the other hand, the courts in Henderson and Bennett took into account the less serious consequences of preventive detention and ruled that unreliability affected the weight rather than the admissibility of psychiatric predictions in those cases.

Where the Canadian Parliament or courts choose to draw the line is essentially a policy rather than a "black-letter" legal question. A strict application of a Frye type test could result in a total ban on psychiatric testimony in dangerous offender hearings on the ground that the expert prediction of violence is not a reputable scientific technique. However, a carefully prepared assessment of a defendant's propensities to further violence may have some predictive credibility, at least in probabilistic terms, and may thus be of some limited assistance to the courts. Thus, it may be desirable to assess each prediction on its merits and, in some cases at least, to let the problem of general unreliability go to weight rather than admissibility.

In R. v. Knight,[92] a case arising under the provisions which preceded the current Part XXI of the Code, the Ontario High court dismissed an application to have the accused declared a dangerous sexual offender due to the unreliability of the psychiatric evidence advanced by the Crown. Apparently the two psychiatrists who testified that the accused was likely in the future to fail to control his sexual impulses, formed their opinions at least partly on the basis of their reading of police reports of incidents not proved before the court.[93] Morden, J. observed that while the test for the admissibility of expert evidence in Canada was perhaps not as strict as in England or the United States, nevertheless "the fundamental principle remains that if the tribunal in fact is not satisfied as to the truth of facts which are material to the opinion

introduced, then the weight to be given to the opinion is correspondingly diminished."[94]

The Supreme Court of Canada has recently made a somewhat stronger statement of this principle in the case of R. v. Abbey.[95] While the case concerned insanity rahter than dangerousness, Mr. Justice Dickson, for the Court, made the following significant general comment regarding the admissibility and weight of psychiatric testimony:

> While it is not questioned that medical experts are entitled to take into consideration all possible information in forming their opinions, this in no way removes from the party tendering such evidence the obligation of establishing, through properly admissible evidence, the factual basis on which such opinions are based. Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist.[96]

An application of this principle to the use of predictive opinions in Dangerous Offender hearings might take the Canadidan courts down a similar road to that recently travelled by their American counterparts. Thus, even if the use of psychiatric testimony continues to be mandated as it is at present under Part XXI, that fact alone should not relieve such experts" of their responsibility to substantiate their predictive opinions.

3:4 Burdens and Standards of Proof

Burdens of Proof

Cross has defined the legal burden of proof as being "the obligation of a party to meet the requirement of a rule of law that a fact in issue be proved [or disproved]...."[97] In general this burden lies with the prosecution in criminal cases.[98] This legal burden of proof should not be confused with the evidential burden which is "the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue...."[99]

With regard to Dangerous Offender proceedings it seems always to have been assumed that both the legal and evidential burdens of proof are to be borne by the prosecution. In other words the Crown must prove, to a required standard,[100] that the offender is 'dangerous' as defined in Part XXI of the Criminal Code.

It will not be suggested here that this state of affairs should be changed. However, for completeness' sake, it should be noted that the burdens of proof could be apportioned somewhat differently. In criminal cases, it has long been established that where an accused wishes to raise certain defences, such as insanity, automatism or provocation, he must bear an evidential burden of demonstrating that there is a triable defence. The Crown must then discharge the legal burden of negating the defence which has been raised. To take insanity as an example, the rationale behind this arrangement is that there exists a legal presumption

of sanity which must be rebutted before a court will entertain a defence of insanity.

An application of this model to Dangerous Offender proceedings might produce the following result. The existence of certain established facts, such as a history of convictions for serious personal injury offences, could raise a presumption of dangerousness. The offender would then bear the evidential burden of showing that there was a triable case as to non-dangerousness. If however, as at present, a finding that a person was a Dangerous Offender required not merely a violent record, but also a prediction of future violence, then a triable case would not be difficult to raise and the burden of proof would shift back to the prosecution. The problem with adapting such a model under the present legislation is that the definitions are so broad and the range of incidents capable of triggering a Dangerous Offender application so various, that it is difficult to narrow the type of facts to be established by the Crown which would raise a presumption of dangerousness.

Standards of Proof

Anglo-Canadian jurisprudence has traditionally recognized two standards of proof, one for criminal cases and a lower one for civil. In addition, American courts have recently developed an intermediary standard primarily for use in civil cases where the consequences of judgment against a respondent are especially serious.

A classic statement of the difference between the criminal and civil standards was made by Denning J. (as he then was) in Miller v. Minister of Pensions.[101] He described the criminal standard as follows:

> That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence "of course it is possible but not in the least probable" the case is proved beyond reasonable doubt, but nothing short of that will suffice.[102]

In contrast, the standard of proof required in civil cases was described thus:

> That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: "we think it more probable than not," the burden is discharged, but if the probabilities are equal it is not.[103]

Thus to obtain a criminal conviction the prosecution must prove its case

"beyond reasonable doubt," whereas a civil case can be adjudicated on the basis of a "preponderance of the evidence."

Somewhere between these two standards lies the American test of "clear and convincing" proof. This third standard was approved by the United States Supreme Court in Addington v. Texas[104] in the context of a challenge to that state's civil commitment procedure. A patient argued that the state should be required to satisfy a criminal rather than a civil standard in proving the likelihood of future dangerousness necessary for a commitment. Regarding the possibility of using a criminal standard, the Supreme Court observed:

> Given the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous.[105]

Nevertheless, the Court found the civil standard of proof to be too weak in view of the "weight and gravity" of "the individual's interest in the outcome of a civil commitment proceeding."[106] Accordingly the Court opted for the intermediate standard of "clear and convincing" proof.[107]

Alan Stone has classified these three standards in terms of the following probability thresholds:

> ...the predictive success appropriate to a legal decision can be described in three levels of increasing certainty: preponderance of the evidence, 51 percent successful; clear and convincing proof, 75 percent successful; beyond a reasonable doubt, at least 90 percent successful.[108]

When these standards of proof are defined in such concrete terms, rather than vague legal jargon, it rapidly becomes clear that none of the standards fits comfortably in the context of a Dangerous Offender hearing.

The Implications of a Probabilistic Model

If we take seriously the American Psychiatric Association's claim in Tarasoff that, in the present state of the art, expert predictions of dangerousness are "more often wrong than right,"[109] then it is difficult to see how a prediction of dangerousness in absolute terms can be proved to the satisfaction of any of the traditional standards. Certainly courts should refrain from purporting to assign to offenders unequivocal dangerousness labels. Moreover, the language of the courtroom should be demystified to prevent the use of vague diagnostic labels as a smokescreen for speculative predictions. As Norval Morris once observed:

> We must get rid of the usual dialogue between the judge and the psychiatrist which goes something like this: "Doctor, is he dangerous?" Reply: "He's psychotic." And sometimes the judge and the doctor think that they have talked to one another.[110]

Yet what is to be done about the substantive question of the apparent impossibility of proving future dangerousness to any of the accepted legal standards? The solution is unlikely to come from an improvement in clinical predictive accuracy. As one clinician has concluded:

> Someday we may be able to provide the courts with a relatively accurate probability statement of a given individual's likelihood of committing a dangerous act... It is extremely unlikely, however, that our probability statements will ever reach a 50% level, and any court which expects an accurate prediction that a person is more likely than not to commit a dangerous act is relying on nonexistent expertise.[111]

Even if a 51% level of accuracy could be attained, thus making it possible to satisfy a civil standard of proof, it seems highly improbable that techniques of prediction will ever attain the precision necessary to discharge either of the higher standards.

This apparent impasse is however only reached when dangerousness is defined in absolute terms. As David Wexler has pointed out:

> Ironic as it may seem, mental health professionals (or actuarial tables) may well be able to prove "dangerousness" beyond a reasonable doubt. That is true, however, if and only if "dangerousness" is viewed as a probability statement, rather than as an <u>absolute</u> claim that violent behavior will occur.[112]

If a probabilistic model is adopted, as is clearly dictated by the scientific evidence, then, to repeat Nigel Walker's phrase, the "irresistible arithmetic" of the "anti-protectionists"[113] once again collapses.

Within a probabilistic framework, legal proof becomes a matter of demonstrating that there is a certain likelihood that a probable event will occur. In other words, future dangerousness must be proved in terms of a probability of a probability. This immediately results in a drastic reduction of the odds, and it does indeed become realistic to talk in terms of proving dangerousness even "beyond reasonable doubt."

However, as Walker rightly stresses, difficult judgments must still be made. The setting of each of the probability thresholds, together with their weight relative to each other, are matters to be decided on "a priori policy grounds."[114] Thus if the criteria for predicting dangerousness are rigorous, it will be difficult to prove the accuracy of the prediction to any high degree. Conversely, if a prediction need only be based on , for example, a history of violent behaviour, then it may be relatively easy to demonstrate almost conclusively that the criteria have

been satisfied.

The Standard of Proof Currently Required Under Part XXI of the Criminal Code

Canadian courts have often adopted a simplistic view of the issue of proving future dangerousness. In cases arising under the former Dangerous Sexual Offender provisions it was generally assumed that the likelihood of future violence or future failure to control sexual impulses must be proved beyond a reasonable doubt. Applications were sometimes dismissed where courts felt that this standard of proof had not been attained.[115]

Under the present Part XXI of the Code, the Attorney General must "establish to the satisfaction of the court" the necessary elements for a finding that an accused is a Dangerous Offender, including the likelihood of future violence.[116] In R. v. Jackson,[117] the Nova Scotia Supreme Court interpreted the requirement of proof "to the satisfaction of the court" as being "equivalent to the normal burden in criminal cases and it therefore falls upon the crown to establish all of the necessary elements contained in the section beyond a reasonable doubt."[118] In finding the case to be proved to this standard the court did not discuss the problematic nature of dangerousness predictions, nor did it attempt to define the word "likelihood".

Under the old habitual offender provisions, the court acknowledged the problematic nature of the burden of proof placed on the Crown. In R. v. Knight,[119] for instance, Mr. Justice Morden noted:

> I wish to make it clear that when I refer to the requisite standard of proof respecting likelihood I am not imposing on myself an obligation to find it proven beyond a reasonable doubt that certain events will happen in the future -- this, in the nature of things would be impossible in practically every case — but I do refer to the quality and strength of the evidence of past and present facts together with the expert opinion thereon, as an existing basis for finding present likelihood of future conduct.[120]

The thorny issue of what it means to prove a "likelihood" under the new s.688 has at last been raised in R. v. Carleton.[119] McGillivray C.J.A., for the majority of the Alberta Supreme Court, interpreted Part XXI of the Code as requiring proof of dangerousness purely on a past-act basis, and was thus able to find that there was no need for an actual prediction of violence to be made at all:

> It is that existing conduct which the judge must consider in determining whether it is likely that injury may be caused to others in the future. The phrase is "by his conduct has shown a likelihood". It is the nature of that conduct which the judge must be satisfied is such that it is likely to cause injury to others in the future... The likelihood is not as to the probability of whether this offender

> will in fact offend again - the likelihood flows from the conduct of the offender up to the time of the hearing.[122]

While it is good that one of the problems associated with proving dangerousness is now out in the open, it is less clear that the Alberta Supreme Court was the most appropriate forum for resolving such a far reaching policy matter, or that it adopted the best solution. By setting the threshold for proving dangerousness so low (i.e. past acts alone suffice) the court has completely done away with the element of actual prediction which up to now has been central to Dangerous Offender hearings.

The scope for confusion regarding standards of proof can be seen in the extremely dubious logic employed in the brief concurring judgment of McDermid J.A. in Carleton:

> The Chief Justice states that the court must have no reasonable doubt as to such "likelihood". All dictionaries I have consulted give as a synonymic definition of "likelihood", "probability". To say that the court must have no reasonable doubt as to the likelihood or probability is the same as to say that the court on a preponderance or a balance of probabilities must be satisfied. The dominant word is "likelihood". To prove beyond a reasonable doubt a probability still leaves only a probability and to prove a probability on a balance of probabilities leaves only the same probability.[123]

The judge made no attempt to assign a threshold value to "likelihood" in probabilistic terms.[124] This omission in itself begs a huge question. However, whatever the threshold of "likelihood" may be, McDermid's argument seems to be spurious. There will always be a difference between proving a probability beyond reasonable doubt and proving it on the balance of probabilities. A further issue has been raised by the recent Supreme Court of Canada decision in R. v. Gardiner.[125] Gardiner deals with, among other things, whether or not in a sentencing hearing following a guilty plea, any facts the Crown wishes to establish, beyond those required to establish the essential legal ingredients of the offence admitted by the plea (that is, the aggravating facts), are subject to the criminal standard of proof. In the words of the Court,

> if the facts are contested the issue should be resolved by ordinary legal principles governing criminal proceedings including resolving relevant doubt in favour of the offender.

They conclude that

> both the informality of the sentencing procedure as to the admissibility of evidence and the wide discretion given to the trial judge in imposing sentence are factors militating **in favour** of the retention of the criminal standard of proof beyond a reasonable doubt at sentencing.

The Court also noted that no good purpose would be served by the adoption in Canadian law of a third standard of proof, "clear and convincing evidence".[126] The effect of the decision in Gardiner on Dangerous Offender proceedings will likely depend on the nature of the application. Where the court is being asked to determine dangerousness simply on a past-act (record) basis, the principles regarding standard of proof determined by the court in Gardiner would have no bearing. Where the Crown is attempting to use facts arising out of past charges which were not admitted by plea or established at trial, for the purpose of establishing "seriousness" or "brutality", then the principles set down by Gardiner would apply; the standard of proof would be the criminal standard. However, the issue in Dangerous Offender proceedings is often a prediction of future dangerousness, and the question of proof involves proving a probability (or likelihood) to some standard. As this is different than proving aggravating facts beyond a reasonable doubt, the effect of Gardiner on this kind of hearing is unclear.

Fortunately, Carleton has been given leave to appeal to the Supreme Court of Canada. It is to be hoped that the Supreme Court will pay close attention to the policy issues in dealing with the relationship between the criteria for proving dangerousness and the required legal standard of proof, as well as addressing the questions left open by Gardiner.

3:5 The Likely Impact of the Canadian Charter of Rights and Freedoms Interpretation

Canada's new Charter of Rights and Freedoms[127] contains a number of legal protections which might be invoked as a challenge to either the procedures followed in Part XXI hearing or to the principle of indeterminate detention. Although a number of Charter provisions echo clauses in the Canadian Bill of Rights,[128] there are several significant differences between the two documents which have given rise to anticipation that the Charter will have a greater effect in safeguarding individual rights and freedoms.

The Bill of Rights applies only to federal laws, is not a constitutional document, does not displace the principle of Parliamentary supremacy and is worded in such a way as to encourage maximal judicial deference to the presumption of legislative validity. Its two key clauses provide that the Bill's enumerated rights "have existed and shall continue to exist" (s. 1) and that "every law of Canada shall...be so construed and applied as not to abrogate, abridge or infringe...any of the rights or freedoms herein recognized" (s.2). It has variously been interpreted by the courts to be only a canon of interpretation,[129] a declaratory act limiting judicial scrutiny only to those laws which did not exist when the Bill was enacted,[130] or a document guiding the courts to take a hands-off approach to review:

> compelling reasons ought to be advanced to justify the Court...to employ a statutory (as contrasted with constitutional) jurisdiction to deny operative effect to a substantive measure duly enacted by a Parliament constitutionally competent to do so, and exercising its powers in accordance with the tenets of responsible government.[131]

In the 23 years since the Bill's enactment, the Supreme Court of Canada has found only one provision of one statute to be inoperative.[132]

The Charter, by contrast, is an entrenched constitutional document declared to be the supreme law of the land, (s. 52) and, with the exception of s. 33 by which federal or provincial governments may expressly opt out of sections 2 and 7-15 for renewable five year periods, the Charter overrides both federal and provincial legislative supremacy and entrusts to the courts the duty to protect individual rights and liberties.[133] Not only do Canadian courts have power under the Charter to declare of no force and effect laws inconsistent with its provisions (s. 52), they are also granted broad remedial powers to fashion such remedies as they consider "appropriate and just in the circumstances" (s. 32). Once an enumerated right or freedom is proved to have been abridged, the burden rests on government to satisfy the court that the challenged law should be upheld.[134]

It is far too early to determine how aggressively Canadian courts will employ their new constitutional powers to protect citizens' rights. Several influential decisions, however, appear to take the view that the Charter does not represent a departure or displacement of "a fairly efficient and reasonable system of criminal law."[135] To a large extent their stance will be revealed by their interpretations of s. 1 which states:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Clearly the language of s. 1 allows the courts considerable latitude in scrutinizing exercises of government authority.

Three standards of review are already perceivable. The most deferential holds that since Canada is a democracy and because other democracies have similar laws, the infringement under review satisfies s. 1. In the Ontario Censor Board case,[136] for instance, the court noted that "eight other provinces and many other democratic countries have similar legislation", there is "sufficient concern about this problem to enact legislation to combat it," and therefore some prior censorship of film is "demonstrably justified." As for the "reasonable limits" clause, the court decided the case on other grounds, but stated,

> One thing is sure, however; our courts will exercise considerable restraint in declaring legislative enactments, whether they be statutory or regulatory, to be unreasonable.[135]

A slightly less deferential position adopts nearly wholesale the "valid federal objective" test prevalent in the later Bill of Rights cases[138] by which laws enacted for a reasonable social, economic or other state purpose were upheld without any judicial scrutiny of the means chosen to effect such purpose or of the likely effectiveness of the Act.[139] In upholding the prima facie violation of s. 6 of the Charter in the extradition of Helmut Rauca, Evans C.J.H.C.O. concluded,

> I am satisfied that [s. 19 of the Extradition Act] which has as its objective, the protection and preservation of society from serious criminal activity, is one which members of a free and democratic society such as Canada would accept and embrace.[140]

This standard of review is particularly disturbing when applied to criminal law and procedure, because virtually no one would argue that crime prevention or public protection are per se unreasonable or demonstrably unjustifiable. The crucial question, however, is whether the means used to achieve such broad goals are at unreasonable or unjustifiable cost to individual rights.[141]

The most rigorous approach, similar to that applied in U.S. jurisprudence, examines the relationship between the objective sought to be achieved and the relevance, justifiability and suitability of the means adopted to such end. "A limit is reasonable if it is a proportionate means to attain the purpose of the law."[142] Under such a test, the court would examine whether the law is overbroad or underinclusive or whether its end can be achieved by less substantial abridgment of individual rights. Although few Canadian courts have yet applied such a thoughtful test to Charter cases, it seems clear, especially in light of the negligible impact of the Bill of Rights in checking legislated curtailment of individual rights, that only such rigorous scrutiny will ensure that individual and minority interests are not subordinated to the interests of electoral majorities.

Of specific relevance to the issue of preventive detention are the legal rights guaranteed in section 7 (the right to fundamental justice), s. 9 (freedom from arbitrary detention), s. 11 (f) (the right to a jury trial), and s. 12 (freedom from cruel and unusual punishment); and equality rights guaranteed in s. 15 (but not in force until April, 1985). With the exception of the right to a jury trial each provision has an analogue in the Bill of Rights. Although the process, rationalization, principle and impact of indeterminate sentencing pose a number of serious substantive concerns about accuseds' rights, under both the Bill of Rights and the Charter, Canadian courts have consistently avoided substantive issues, and limited their review to deferential consideration of public policy objectives and to the question of whether the accused has been processed strictly in accordance with existing law.

Legal Rights

Both the Bill of Rights and the Charter protect the right to life, liberty and security of the person. The former Act prohibits deprivation of such rights "except by due process of law" (s. 1(a)). Although there is extensive U.S. constitutional jurisprudence which gives substantive as well as procedural content to this principle, Canadian courts have expressly rejected this model[143] and have narrowly interpreted s. 1(a) to mean only "according to law" - i.e. in conformity with the disposition of existing law or legislation.[144] Although the Charter replaces the term "due process" with the phrase "the principles of fundamental justice", early Charter cases have not seen this change in wording to be of significance and have refused to give s.7 substantive meaning independent of the specific procedural rights enumerated in sections 8 through 14.

In Holman,[145] for instance, the court equated "the principle of fundamental justice" with procedural "natural justice" concluding "the scope of judicial review under s. 7 would appear to be quite limited".[146] Similarly, in Gustavson,[147] the court rejected the argument that s. 7 protects substantive rights. The offender had argued that the broad judicial discretion given the Crown and the court by Part XXI of the Code results in unequal and arbitrary treatment of individuals deemed "dangerous offenders" because some receive determinate sentences while other receive fixed jail terms. The court ruled that judicial discretion in sentencing does not violate s. 7 and perfunctorily rejected the substantive rights argument by citing Ex Parte Matticks[148] in which the Supreme Court of Canada asserted baldly and without reasons that the old s. 688 dealing with habitual offenders was not inoperative by virtue of the Bill of Rights. This reasoning is clearly inadequate in so far as the old s. 688 focused largely on the offender's prior criminal history, while the new section centres largely on predictions of future dangerousness.

Charter challenges to s. 688 based on the right not to be arbitrarily detained or imprisoned (s. 9) have been governed by Bill of Rights case law and therefore have consistently failed. In response to the argument that the unreliability of predictions of future dangerousness resulted in arbitrary detention in violation of s. 2(a) of the Bill of Rights, the court in R. v. Roestad ruled that "a form of imprisonment legislated by the collective will of Parliament" could not be interpreted as arbitrary.[149] In Hatchwell,[150] Robertson, J.A. simply asserted, "I do not think that this [indeterminate detention] is what is meant by the words 'arbitrary detention, imprisonment', and I can see nothing 'arbitrary' involved in Code s. 688."[151]

Three recent cases have stressed the similarity between s. 9 of the Charter and s. 2(a) of the Bill of Rights, and have found Bill of Rights precedent, particularly the Supreme Court's blanket judgment in Ex Parte Matticks, conclusive in disposing of claims that s. 688 imposes arbitrary detention. In R. v. Simon (No. 3)[152] for instance, Mr. Justice de Weerdt found:

> That decision of the Supreme Court of Canada is, in my respectful view, dispositive of the motion before me, having regard to the close correspondence and consequent closely similar effect of a) section 2(a) of the Canadian Bill of Rights and section 9 of the ...Charter; and b) section 2(b) of the Canadian Bill of Rights and s. 12 of the Charter, bearing in mind the unbroken continuity of legislative intent respecting the protection of the public by imposition, where necessary, of sentences of indeterminate detention in a penitentiary under section 688, from at least 1970 to the present day.[153]

A different approach was taken in Newall,[154] where an accused argued that a minimum seven year sentence for drug trafficking resulted in arbitrary treatment:

> As I read section 9, it is directed at a situation similar to those instances where there may be grounds for a writ of habeas corpus. It is meant to allow the release from incarceration of someone who is wrongly there because the order detaining him was made arbitrarily as opposed to judicially. Because I am sentencing each accused in accordance with the law, their subsequent imprisonment is not arbitrary.[155]

In so far as habeas corpus proceedings are guaranteed expressly under s. 10(c) of the Charter, this reasoning is inadequate and, like other s. 9 challenges, appears uncritically deferential to the legislative status quo at the expense of substantive review of the law under analysis.

The denial of a right to a jury in Part XXI proceedings was challenged in R. v. Simon (No. 2).[156] Section 11(f) of the Charter provides that any person "charged with an offence" (except in the case of military offences tried by military tribunal) has the right to "the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment." The court ruled that s. 11(f) applies only to persons charged with an offence - i.e. before conviction or acquittal, and that

> It would be stretching section 11(f) beyond its intended scope to hold that it now requires the intervention of a jury following conviction and for purposes related only to sentencing.[157]

It might be argued that if s. 11 indeed is limited only to pre-sentencing proceedings, the risk of a life-long indeterminate sentence without a jury trial is a breach of fundamental justice pursuant to s. 7 of the Charter.

Both the Charter and the Bill of Rights guarantee the right not to be subjected to cruel and unusual treatment or punishment.[158] Because the terms "cruel and unusual" have been read conjunctively,[159] a finding that a type of treatment or punishment is cruel but common is insufficient to invalidate a law under this guarantee.

The claim that indeterminate detention results in cruel and unusual treatment has consistently failed under the Bill of Rights. In Roestad,[160] the court rejected the argument that cruelty arises from the lack of a known release date and from the possibility of an offender's serving a longer period of detention than someone sentenced to life imprisonment. The court stated,

> If the object of indeterminate detention is to punish a person for something he has not yet done I have no doubt that it is cruel. If the man is sentenced to indeterminate detention for the purpose of protecting the public from likely pain, injury or other evil coupled with the safeguards contained in section 666 (sic) I do not consider it would be cruel. Whether punishment is cruel therefore depends upon the object of the punishment as set out in the legislation.[161]

This focus on legislative objectives without regard to the means used or the impact on the recipient of punishment also prevailed in Saxell.[162] The accused had argued that because the Crown advanced evidence of insanity (subjecting the accused to indefinite detention under Lieutenant Governor's warrant upon acquittal) and denied the accused the right to risk a short prison sentence upon conviction, the resulting sentence which treated the accused more harshly than others acquitted of offences, than others convicted of the same offence, and than other insane persons detained under civil proceedings amounted to cruel punishment. The court avoided the substantive issues raised and asserted, "detention of the accused is not punishment at all, but is for the protection of the public and the treatment of the accused".[163] Although Dangerous Offenders do not receive mandatory treatment following sentencing, invocation of crime prevention and public safety by the Crown may remain sufficient in the eyes of Canadian courts to pre-empt review of the impact of such broad and unobjectionable policies on individual rights.

One Bill of Rights case holds out promise that the courts may engage in substantive review under s. 12. In R. v. Shand,[164] the Ontario Court of Appeal proposed a "disproportionality principle", by which a prescribed treatment or punishment might be deemed cruel if it is "obviously excessive...going beyond all rational bounds of punishment in the eyes of reasonable and right thinking Canadians."[165] However, in that case, the mandatory minimum sentence of seven years' imprisonment for importing narcotics was held not to be disproportionate. Arnup, J.A. for the Court argued that in view of the major proportions of the "drug problem in Canada" a minimum sentence of seven years was not inappropriate. While he conceded that in some circumstances such a sentence might be "inequitable" nevertheless "it is not cruel".[166] Echoes of this reasoning can be found in a recent Charter case challenging a deportation order.[167] While the Court admitted that deportation to some countries might constitute cruel and unusual treatment (not punishment), the concept of deportation per se, measured against the "norm" of cruel and unusual treatment was not in violation of s. 12. It remains to be seen whether such a distinction between an individual case and a general law might move the courts to use the broad remedial powers granted under s. 24 to substitute a lesser "treatment" in an individual case.

Equality Rights

The Dangerous Offender provisions of the Code raise a number of concerns regarding the equality rights of the accused. Individuals convicted of the same offence may be subject to significantly different periods of detention while individuals convicted of highly dissimilar offences may be subject to the identical sentence of indefinite detention. Because of the permissive nature of Part XXI even those individuals found to be Dangerous Offenders may receive different sentences - some sentenced to definite periods of detention and others to indeterminate detention. Finally, in so far as the predictive unreliability of psychiatric assessments of dangerousness may result in as many as two false positives for every three assessments,[168] convicted offenders who pose no actual danger to society may suffer the same extreme sanction as the truly dangerous. It should be noted, too, that the discretionary nature of Part XXI proceedings provides the opportunity for the exercise of subjective bias towards particular types of offenders - child molesters or homosexuals, for example - or particular races, age groups or geographic regions.[169]

Under the Canadian Bill of Rights, equality rights are narrowly articulated and have been narrowly construed. Subsection one provides:

> It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion, or sex, the following human rights and fundamental freedoms, namely...
>
> b) the right of individual equality before the law and the protection of the law.

In interpreting this clause, Canadian courts have followed two distinctive routes, both of which resulted in minimal scrutiny of the merits of the challenged law. One line of cases[170] deemed s. 1(b) a guarantee only of procedural equality, i.e. "equality in the administration of the law by the law enforcement authorities and the ordinary courts of the land".[171] A second, and increasingly prevalent line of cases, engaged the courts in modest substantive scrutiny of the purpose of the law. Under this "valid federal objective" test,[172] provided that a federal law has some rational basis for distinguishing between one class of persons and another in order to achieve a valid social, economic or other national objective, it will withstand s. 1(b) challenge.

In applying this test, courts have rarely found a statute inoperative[173] for two reasons. First, the burden of establishing that in drafting the legislation Parliament had neither a valid objective nor a rational basis for the legal distinctions created rests on the challenger.[174] Second, the court focuses only on the reasonableness of the purpose sought to be achieved, not on the means devised to achieve it.[175] Consequently, whether the means chosen are overbroad, treating those differently situated similarly, or underinclusive, treating those similarly situated differently, has not been a material concern to the courts. Although recent case law has amplified the test of validity to

require legislated inequality to represent a "necessary departure from the general principle of universal application of the law for the attainment of some necessary and desirable social objective,"[176] judicial attention continues to centre on ends, not means. Not surprisingly, then, indefinite detention has been consistently found valid.

In Hatchwell,[177] the indefinite detention of habitual offenders was upheld on the ground that Parliament is justified in protecting the public from offenders for whom ordinary detention has not proved an effective deterrent. Differential sentencing for individuals found to be "habitual offenders" and those not so judicially defined was found valid because "[t]wo different classes of persons are involved, and all persons within each class are treated equally."[178] To the extent that habitual offender proceedings focused largely on an accused's past criminal history, the risk of indefinite detention did not raise the spectre of arbitrariness and inequity currently raised by the predictive unreliability of assessments of future dangerousness, and it may be that recidivism did create valid distinctions between convicted offenders. However, the reasoning in Hatchwell obscures the point that de facto habitual offenders were not treated equally: only some were subject to indefinite sentence proceedings, and even those found to be de jure habitual offenders were not always given indeterminate sentences.

In R. v. Saxell,[179] the Ontario Court of Appeal acknowledged that individuals held under Lieutenant Governor's warrant were not treated similarly to other acquitted persons, or other insane persons, and that under s. 542, accuseds charged with crimes ranging from summary to indictable offences might serve identical periods of preventive detention.[180] However, the court found "valid" a distinction between those who have been "truly acquitted" and those acquitted by reason of insanity: there is an "underlying assumption that they may remain a danger to the public". The court was not concerned with the predictive unreliability of such assumptions:

> It may well be that in individual cases that underlying assumption is not valid, but that does not mean that the legislative scheme, in itself, offends the right of equality before the law. Parliament must necessarily paint with a broad brush.[181]

At first glance, the Charter offers more scope to challenge the potential inequalities of treatment permitted by s. 688. Equality rights are more broadly defined. Section 15 (1) states that

> Every individual is equal before and under the law and has a right to equal protection and benefit of the law without discrimination...

This expanded definition, it is anticipated, will protect both procedural (before the law) and substantive (under the law) equality with respect to benefits and entitlements no less than penalties. The inclusion of the "equal protection" clause is intended to encourage the courts to draw on American Fourteenth Amendment jurisprudence[182] which, among other things, charges the courts with ensuring that legislatures do not paint with too broad a brush. U.S. equal protection jurisprudence involves the courts in

an examination of both the legislature's objective and the appropriateness and relevance of the means adopted to achieve its public policies. It is to be hoped, however, that Canadian courts do not adopt the three-tiered standard of review employed in American jurisprudence[183] because the lowest standard, which is currently applied to U.S. habitual offender and dangerous offender statutes,[184] is no more rigorous than our own "valid federal objective" test. Protecting the public from reasonably foreseeable dangers remains a reasonable legislative goal. What our courts must ask themselves, now that they are charged with safeguarding individual rights and balancing potential victims' rights against accuseds' rights, is whether with s. 688, Parliament is purchasing public peace of mind and a potentially modest statistical decrease in crime by disproportionately punishing offenders who pose no actual threat to public safety.

Chapter 3 - Footnotes

1. R.S.C. 1970 c. C-34.

2. Ibid, s. 688.

3. Ibid, s. 687.

4. Either the court which has convicted the person of the relevant offence, or a superior court of criminal jurisdiction. Id., s.687.

5. Ibid, s. 688.

6. Ibid, s. 687.

7. Ibid, s. 688(a).

8. Ibid, s. 688(b).

9. Ibid, s. 689(1)(a). To date, no Attorney General has refused permission to bring a Dangerous Offender application.

10. Ibid, s. 689(1)(b). If an offender admits any allegations contained in the notice, these need not be proved. Ibid, s. 689(3).

11. Ibid, s. 691. Normally, the remand can be for up to 30 days and the decision to remand must be recommended by a medical practitioner or be at the consent of both the prosecution and the offender: s. 691(a). In 'compelling circumstances', and where a medical practitioner is not available, such a remand may be made without medical evidence: s.691(2)(b).

12. Ibid, s. 693(1). The offender may be excluded for being unduly disruptive of the proceedings, or simply at the discretion of the court. s. 693(2).

13. Ibid, s. 690(1).

14. Ibid, s. 689(2). The offender is not obliged to submit to psychiatric examination and psychiatrists may, therefore, base their assessment on other data such as evidence given at the hearing or hypothetical questions: R. v. McAmmond (1970), 1 C.C.C. 175 (Man. C.A.). Lack of direct observation by the expert(s) goes to weight, not admissibility: R. v. Dwyer (1977), 34 C.C.C. (2d) 293 (Alta C.A.). If the offender refuses to be examined, an adverse inference may be drawn: Re Chapelle and The Queen (1980), 52 C.C.C. (2d) 32 (Ont. H.C.).

15. Ibid, s. 690(2).

16. Ibid, s. 690(3).

17. Ibid, s. 692.

18. Ibid, s. 695. Apparently this requirement is not always complied with. It seems to be normal practice to only prepare a transcript of the trial where there is to be an appeal.

19. Ibid, s. 694(1).

20. Ibid, s. 694(2).

21. Ibid, s. 695(1). The criteria for parole release of Dangerous Offenders are the same as the criteria for any parole release: that the offender not constitute an "undue risk"; that a grant of parole would aid in his "reform and rehabilitation"; and that he has "derived the maximum benefit from imprisonment". (See, generally, Ministry of the Solicitor General's 1981 Study of Conditional Release, Chapter 3). By contrast, an accused acquitted by reason of insanity and subject to indefinite detention under Lieutenant Governor's warrant pursuant to s.547 of the Criminal Code is subject to review within 6 months of being detained and at least every 12 months thereafter. Similarly, individuals involuntarily committed under the Ontario Mental Health Act are subject to review upon request or automatically, four times within their first 6 months of detention and every 12 months thereafter.

22. See generally, The Ministry of the Solicitor General's 1983 Draft Report on Current Dangerous Offenders in Canada (The Berzins Study).

23. cf. sections 157 and 246.3 of the Criminal Code.

24. See, e.g., R. v. Hall (1981), 63 C.C.C. (2d) 535 (Alta. C.A.). The offender had six previous convictions for assaults on women and admitted to additional assaults never charged.

25. Technically, the broad language of s. 688 would allow the court to detain indefinitely an individual with only one conviction for assaulting another male, but a "pattern" of homosexuality. Indeed, under the old a. 688 for "habitual offenders" a man was found to be a dangerous sexual offender because he had a long criminal record fjor gross indecency with consenting male adults: Klippert v. The Queen, [1968] 2 C.C.C. 129 (S.C.C.). Aside from the unreliability of predictions of future dangerousness, s. 688 raises serious ethical questions about the degree of prosecutorial discretion permitted in the initiation of dangerous offender proceedings. Individuals with a history of impaired driving or of domestic violence may well meet the definitions in s. 688 better than the one-time rapist whom the court deems "brutal" or the pederast deemed to have caused "evil" to another person. In so far as these provisions have been invoked almost exclusively to detain sexual offenders who commit offences against strangers (rather than, say, family members), the legislation should articulate more clearly precisely what mischief or which type of mischief-makers s. 688 is directed at curbing.

26. See the American Psychiatric Association's amicus curiae briefs in Tarasoff v. Regents of the University of California, 529 P.2d 553 (Superior Ct., Alameda Co., 1974); 551 P.2d. 334 (S.C. Cal., 1976) and Estelle v. Smith 451 U.S. 454 (1981).

27. 293 F. 1013 (D.C.C.A., 1923).

28. Ibid, at 1014.

29. Ibid.

30. For example, in R. v. K. (1979) 10 C.R. 235, a Manitoba court found that the use of hypnosis as a technique for facilitating memory recall did not pass the Frye test. For an alternative American judicial approach, however, see U.S. v. Williams, 583 F.2d 1194 (2d Cir. 1978) and "Recent Developments: Evidence - Admissibility of Evidence - Frye Standard of 'General Acceptance' for Admissibility of Scientific Evidence Rejected in Favour of Balancing Test", 64 Cornell L.R. 875 (1979).

31. See, for example, Kozol, Boucher & Garofolo, "The Diagnosis and Treatment of Dangerousness" 18 Crime & Delinquency 371 (1972).

32. American Psychiatric Association Brief in Tarasoff, note 26, 27 supra. See Chapter 2 generally.

33. Tarasoff, 551 P.2d 334.

34. Ibid, at 339-40.

35. Ibid, at 344.

36. Ibid.

37. Ibid, at 345.

38. Dickens, "Prediction, Professionalism and Public Policy" in Webster, Ben-Aron and Huckers (eds.) Probability and Prediction: Psychiatry and Public Policy, Proceedings of a lecture series held at the Clarke Institute of Psychiatry, Toronto.

39. Cross on Evidence 5th ed. (London: Butterworths, 1979) at 442.

40. Ibid.

41. Preeper & Doyle v. The Queen (1888) 15 S.C.R. 401.

42. R. v. Turner [1975] Q.B. 834 at 841 per Lawton, L.J. To the extent that medical professionals' predictions of dangerousness have not proved consistently more accurate than chance, and to the extent that some studies show lay observers and "experts" reach comparable conclusions about future dangerousness (see, e.g., Quinsey, "Prediction of Recidivism and the Evaluation of Treatment Programs for Sex Offenders" in Verdun-Jones and Keltner (eds.), Sexual Aggression and the Law, Criminology Research Centre, Simon Fraser University, 1983 at 32), it is arguable that "expert" testimony about future dangerousness is not outside the experience and knowledge of judge and jury, and ought not to be admitted.

43. Davie v. Edinburgh Magistrates [1953] S.C. 34 at 40, per Ld. President Cooper.

44. Phipson, Evidence 12th ed. (London: Sweet & Maxwell, 1975), para 1227; R. v. French (1977) 37 C.C.C. (2d) 201 (Ont. C.A.); R v Turner. supra note 42. Another way in which the principle is sometimes expressed is that a witness should normally refrain from stating an opinion on an "ultimate fact" or "ultimate issue". See Report of the Federal/Provincial Task Force on Uniform Rules of Evidence (Toronto: Carswell, 1982) at 102-04.

45. [1975] Q.B. 834 at 841. Juries do not sit in Dangerous Offender proceedings. The judge, however may also be unduly persuaded by the testimony of experts. In R. v. Kelman (1971), 4 C.C.C. (2d) 8 (B.C.S.C.) Mr. Justice Verchere remarked (at 11): "...I am not bound to accept the opinions of psychiatrists. They are offered to help me. But they are all opinions of learned men who are experienced in their field, and I feel I am safe in relying on them to bolster and support my own view of the personality of the respondent".

46. Ottawa: Queen's Printer, 1969.

47. Ibid, at 245.

48. In R. v. Butler (1978), 41 C.C.C. (2d) 410 (Alta. S.C.) O'Byrne, J. stated: "It is clear that the state of the art of predicting dangerous [sic] in this area of the discipline of psychiatric medicine leaves much to be desired. It is one of the least developed areas. To predict dangerous [sic] is, in itself, dangerous. The profession over-predicts" (at 411). Similarly, in Hatchwell v. The Queen (1975), 21 C.C.C. (2d) 201, the Supreme Court of Canada expressed a more general caution: "These are not easy matters of decision for one must balance the legitimate right of society to be protected from criminal depredations and the right of the man to freedom after serving the sentence imposed on him for the substantive offence which he committed....It would seem to me...that when one is dealing with crime of this type...there is greater opportunity and indeed necessity to assess carefully the true nature and gravity of the potential threat" (at 206).

49. "Dangerous People", 1 Int'l. J. of Law and Psychiatry 31 (1978) at 41.

50. Ibid.

51. Ibid, at 42.

52. Dix, "Expert Prediction Testimony in Capital Sentencing: Evidentiary and Constitutional considerations", Am. Crim. Law Rev. 1 (1981) at 13.

53. This was the approach taken by Mr. Justice O'Byrne in R. v. Butler (1978), 41 C.C.C. (2d) 410 (Alta. S.C.). Having noted that the current reliability of psychiatrists' predictions of dangerousness "leaves much to be desired" and that to predict dangerousness is itself dangerous, he dismissed the Part XXI application on the grounds of his own reasonable doubts that the respondent was dangerous: "He [the psychiatrist] said that the accused is relatively difficult to predict. If the whole truth was evident, and I mentioned that it was not, the accused was, in his

view, at the level of a, and I quote, 'a distinct possibility'. He would not say 'likely' and would not give the accused over a 50% probability. He assessed a 15 to 20% likelihood in his life-time of similar offences and this was founded purely on intuition" (at 412).

54. See Part I of this study, especially at pages 6-7.

55. Bonnie & Slobogin, "The Role of Mental Health Professionals in the Criminal Process: The Case For Informed Speculation", 66 Virginia. Law. Rev. 427 (1980) at 443.

56. "They Call Him Dr. Death" Time, June 1st, 1981 at 64. See Ewing, "'Dr. Death' and the Case for an Ethical Ban on Psychiatric and Psychological Predictions of Dangerousness in Capital Sentencing Procedures." 8 Am. J. of Law & Medecine 407 (1983) at 428.

57. Note, "People v. Murtishaw: Applying the Frye Test to Psychiatric Predictions of Dangerousness in Capital Cases", 70 Cal. L.R. 1069 (1982) at 1069-1090.

58. Ewing, note 56, supra.

59. 428 U.S. 262.

60. Texas Code art. 37.071.

61. Ibid, at 37.071(b). The procedure was discussed in more detail by the Supreme Court in Jurek v. Texas, note 59 supra.

62. Note 59, supra at 274.

63. Ibid, at 275-76.

64. 596 S.W. 2d 875 (Tex. Crim. App.)

65. Ibid, at 887.

66. Ibid.

67. Ibid. The same stance is taken by Canadian courts. In R. v. Johnston, [1965] 3 C.C.C. 42 at 50 (Man. C.A.), Schultz, J.A. remarked: "The Code section does not require the psychiatrists to examine and interview the accused. If an accused did not co-operate, the psychiatrist could base his opinions on the evidence at the hearing or give answers to hypothetical questions or, in some other way, satisfactorily comply with the obligation imposed by Section [689(2)]."

In R. v. Butler (1978), 41 C.C.C. (2d) 410 (Alta. S.C.), Mr. Justice O'Byrne explicitly weighed the evidence of a psychiatrist who had not seen the offender against that of two psychiatrists who had interviewed Butler personally and stated he preferred the opinions of the latter two experts because "they had actually seen the offender and did so after sentence was passed" (at p. 412).

68. Ibid.

69. Ibid.

70. Barefoot v. Estelle, 51 LW 5189. See Chapter 2, note 100, supra, for the substance of the majority ruling on the use of psychiatric testimony. A recent Canadian Dangerous Offender hearing, R. v. Morrison (unreported), heard evidence as to the unreliability of psychiatric predictions of future dangerousness. Insofar as Morrison declared a Dangerous Offender, it seems unlikely that this testimony had a profound influence upon the decision of the judge.

71. APA Brief, cited in 18 Psychiatric News no.8 at 30 ("Dangerousness not Predictable, APA Tells Supreme Court")

72. 451 U.S. 454 (1981).

73. Ibid. For a fuller discussion of this case see Comment, "Estelle v. Smith and Psychiatric Testimony: New Limits on Predicting Future Dangerousness." 33 Baylor L. R. 1015 (1981).

74. 175 Cal. Rptr. 738 (1981).

75. Ibid, at 758.

76. Ibid.

77. Ibid.

78. "Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom" 62 Cal. L.Rev. 693 (1974).

79. "The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence", 29 Rutgers L. Rev. 1084 (1976).

80. People v. Murtishaw, supra note 74 at 761. In this respect the Californian capital sentencing procedure clearly differs from that of Texas, and this point may be of some significance in the Barefoot appeal.

81. Ibid, at 760. The court further stressed the "qualitative difference" between the death penalty and any form of imprisonment or commitment. Ibid, at 761.

82. Ibid, at 762.

83. Ibid.

84. Ibid.

85. Ibid, at 763.

86. 162 Cal. Rptr. 886 (Cal. C.A. 3rd Dist. 1980); Rehearing, 166 Cal. Rptr. 20 (Cal. C.A. 3rd Dist. 1980).

87. Murtishaw, note 74, supra at 761.

88. Ibid.

89. 182 Cal. Rptr. 473 (Cal. C.A. 2nd Dist.)

90. Ibid, at 477.

91. See text accompanying notes 49 to 52, supra.

92. (1975) 27 C.C.C. (2d) 343.

93. Ibid, at 354.

94. Ibid, at 356.

95. (1982) 68 C.C.C. (2d) 394.

96. Ibid, at 412.

97. Note 39 supra at 86.

98. Woolmington v. D.P.P. [1935] A.C. 462.

99. Cross, note 39, supra at 87.

100. This standard is discussed below.

101. [1947] 2 All E.R. 372.

102. Ibid, at 373.

103. Ibid, at 374.

104. 441 U.S. 418 (1979).

105. Ibid, at 429.

106. Ibid, at 427.

107. Ibid, at 433. The trial court had actually used the phrase "clear, unequivocal and convincing" and this was held to be satisfactory. The Supreme Court noted that 20 states use a "clear and convincing" evidence standard, three use "clear, cogent and convincing," and two require "clear, unequivocal and convincing." Ibid, at 431-32.

108. Mental Health and Law: A System in Transition, (New York: Aronson, 1975) at 33.

109. Note 26, supra 551 P.2d 334 at 344. See also Cocozza and Steadman, supra note 79 at 1099, who concluded that a review of the research literature provided "clear and convincing evidence of the inability of psychiatrists or anyone to predict dangerousness accurately".

110. "The Criminal Justice System and Psychiatry: Past, Present and Future", in Irvine and Brelje (eds.) Law, Psychiatry and the Mentally Disordered Offender, Vol. 1 (Springfield, Illinois: Charles Thomas, 1972) at 12.

111. Halleck, Law in the Practice of Psychiatry (New York: Plenum, 1980) at 132.

112. Mental Health Law (New York: Plenum, 1981) at 60.

113. Note 4,9 supra.

114. Note 112, supra at 61.

115. R. v. Loysen (1973) 13 C.C.C. (2d) 202 (B.C.S.C.); R. v. Butler (1978), 41 C.C.C. (2d) 410 (Alta. S.C.)

116. Criminal Code, s. 688.

117. (1981) 61 C.C.C. (2d) 540.

118. Ibid, at 544 per Hart J.A. With regard to Part XXI the Crown must prove both that the offender has committed a "serious personal injury offence" and that he is dangerous as defined in s. 688(a) or (b).

119. (1975), 27 C.C.C. (2d) 343 (Ont. H.C.)

120. Ibid, at 356. This passage is cited with approval in R. v. Dwyer (1977), 34 C.C.C. (2d) 293 (Alta. C.A.) at 302-3.

121. (1981) 69 C.C.C. (2d) 1 (Alta.S.C.) Leave to appeal to the Supreme Court of Canada granted April 5, 1982.

122. Ibid, at 6.

123. Ibid, at 10.

124. In R. v. Butler (1978), 41 C.C.C. (2d) 410, the court appears to have implicitly set the minimal threshold at a 50% probability. See note 53 supra.

125. R. v. Gardiner (1982) 68 C.C.C. (2d)

126. Ibid, at 516.

127. Canada Act, 1982 (U.K.) c. 11, Sched. B. Hereafter referred to as the Charter.

128. S.C. 1960, c. 44 (R.S.C. 1970, Appendix III). Hereafter referred to as the Bill of Rights.

129. See, e.g. R. v. Drybones, [1970] S.C.R. 282 at 286-7 per Cartwright, C.J.C.

130. See, e.g. A.-G. Can. v. Lavell, [1974] S.C.R. 1349 at 1365 per Ritchie, J. and R. v. Miller and Cockriell, [1977] 2 S.C.R. 680 at 286-7 per Ritchie, J.

131. Curr v. The Queen, [1972] S.C.R. 889 at 899.

132. In R. v. Drybones, [1970] S.C.R. 282, section 94(b) of the Indian Act was found to be inoperative as a violation of equality before the law.

133. S. 32 of the Charter states that it applies to the Parliament and government of Canada and to the legislature and government of each province "in respect of all matters" within their authority. It is as yet unclear to what state acts and interests the Charter applies in addition to statutes and regulations. See, Swinton in Tarnopolsky and Beaudoin, Canadian Charter of Rights and Freedoms: Commentary, Carswell, 1982. Hereafter, Tarnopolsky.

134. See Marx, "Entrenchment, Limitations and Non-Obstante (ss. 1, 33, 52)" in Tarnopolsky, especially at 68.

135. Monnin, J.A. for the Manitoba Court of Appeal in R. v. Belton, [1983] 2.

136. Ontario Film and Video Appreciation Society v. Ontario Censor Board, unreported, Ont. Div. Ct., March 25, 1983.

137. Ibid, at 13.

138. See, e.g. R. v. Burnshine, [1975] S.C.R. 793.

139. In effect, this test represents an implied limitation clause. When the court found differential treatment of Indian women and Indian men who marry non-Indians to be for a valid federal objective (see A.-G. Can. v. Lavell, [1974] S.C.R. 1349) it found no inequality before the law. There was, then, an unstated distinction between actual inequality and de jure inequality. Early Charter cases have been slow to perceive this distinction, and have therefore found no arbitrary treatment, no cruel and unusual punishment, no lack of fundamental justice, when what they mean is that they find such treatment reasonable or justified and therefore constitutional.

140. Re Federal Republic of Germany and Rauca (1982), 1941 D.L.R. (3d) 412 (Ont. High Ct.)

141. The castration of all rapists or the execution of all drunk drivers, for instance, might well lead to a decrease in crime and increase in public safety. Surely, however, whether such measures are reasonable limits on the right to life, liberty and security of the person, or whether they are demonstrably justified must be addressed.

142. Quebec Assn. of Protestant School Boards et al v. A.-G. Quebec (no. 2) (1982), 140 D.L.R. (3d) 33 (Que. Sup. Ct.). Deschesne C.J.S.C. proposes a three point process for determining what are reasonable limits: 1) A limit is reasonable if it is a proportionate means to attain the purpose of the law; 2) Proof of the contrary involves proof not only of a wrong, but of a wrong which runs against common sense; and 3) The courts must not yield to the temptation of too readily substituting their opinion for that of the legislature. In the result, he found that portions of the Quebec Charter of the French Language) failed to satisfy the proportionality test and declared them of no force and effect.

143. See, e.g., R. v. Saxell (1980), 59 C.C.C. (2d) 176 (Ont. C.A.) at 188: "American cases are of limited use in the interpretation of the Canadian Bill of Rights. Not only does the phrase "due process of law" bear a different meaning in Canada from that which it bears in the United States, but the two systems of Government are so different as to make the reasoning in the American cases inappropriate to Canada."

144. cf. Tarnopolsky at 275.

145. (1982), 28 C.R. (3d) 378 (B.C. Prov. Ct.).

146. Ibid, at 388.

147. (1983), 1 C.C.C. (3d) 470 (B.C.S.C.)

148. (1973), 15 C.C.C. (2d) 213.

149. (1971), 5 C.C.C. (2d) 564 (Ont. Co. Ct.) at 567.

150. [1974] 1 W.W.R. 307 (B.C.C.A.), reversed by [1976] 1 S.C.R. 39.

151. Ibid, at 314.

152. (1982), 69 C.C.C. (2d) 557 (N.W.T.S.C.)

153. Ibid, at 560.

154. R. v. Newall et al (No. 4) (1982), 70 C.C.C. (2d) 10 (B.C.S.C.)

155. Ibid, at 19. See, generally, Chevrette "Protection Upon Arrest or Detention and Against Retroactive Penal Law (ss. 8, 9, 10(c), 11(e), (g) and (i)"in Tarnopolsky at 311-312.

156. (1982), 69 C.C.C. (2d) 478 (N.W.T.S.C.)

157. Ibid, at 479.

158. See Charter s. 12 and Bill of Rights s. 2(b).

159. Miller v. The Queen, (1976) 31 C.C.C. (2d) 177 per Ritchie, J. at 197. Laskin, C.J.C. concurred in the result but proposed the two words be read as "interacting expressions colouring each other" at 184. This interpretation was recently adopted in Re Gittens and the Queen (1982), 68 C.C.C. (2d) 438 (F.C.T.D.). In an unreported Charter challenge to Part XXI arguing that indeterminate sentences subject the offender to cruel and unusual punishment, Mossop, J. declined to rule on whether the terms should be read conjunctively disjunctively or in interactive, though he favoured the Gittens approach. cf R. v. Morrison, judgment delivered July 7, 1983.

160. (1971), 5 C.C.C. (2d) 564 (Ont. Co. Ct.).

161. Ibid, at 574 [s.661 may have been intended].

162. R. v. Saxell (1980), 59 C.C.C. (2d) 176 (Ont. C.A.)

163. Ibid, at 188.

164. (1976), 30 C.C.C. (2d) 23 (Ont. C.A.).

165. Ibid, at 37.

166. Ibid, at 36.

167. Re Gittens and the Queen (1982), 68 C.C.C. (2d) 438 (F.C.T.D.). As well, see R. v. Morrison, note 157, supra.

168. See Chapter 2, especially at notes 76-89.

169. See Berzins, The Ministry of the Solicitor General's 1983 Draft Report on Current Dangerous Offenders in Canada, and R. v. Burnshine, [1975] S.C.R. 793 on provincial disparities in sentencing.

170. See, e.g., A.-G. Canada v. Lavell, [1974] S.C.R. 1349 at 1365.

171. Tarnopolsky, "Equality Rights in the Canadian Charter of Rights and Freedoms", 61 Can. Bar Rev. 242 (1983) at 249.

172. See text at note 9-10 supra.

173. Since R. v. Drybones, [1970] S.C.R. 282 (decided prior to the adoption of the valid federal objective test) no challenge under s. 1(b) has been successful in the Supreme Court of Canada.

174. cf. R. v. Burnshine, [1975] S.C.R. 793 at 707-708: "...it would be necessary for the respondent, at least, to satisfy this Court that in enacting [the law under scrutiny], Parliament was not seeking to achieve a valid federal objective."

175. See Re Anti-Inflation Act, [1976] 2 S.C.R. 373 at 425 per Laskin C.J.C.: "...it is not for the Court to say...that because the means adopted to realize a desirable end...may not be effectual, those means are therefore beyond the legislative power of Parliament."

176. MacKay v. The Queen, [1980] 2 S.C.R. 370 at 406-7 [italics added]. McIntyre J., in addition to proposing the necessary departure approach, in testing the validity of legislatures' powers to distinguish between one class or group of citizens and another, also introduced the idea that courts should concern themselves with the motive of legislatures:

> "I would be of the opinion...that as a minimum it would be necessary to inquire whether any inequality...has been created rationally in the sense that it is not arbitrary or capricious and not based upon any ulterior motive or motives offensive to the provisions of the Canadian Bill of Rights,..."

If the valid federal objective test is adapted to the Charter in applying s. 1, it may be that McIntyre J's concern with government motives will provide an opening for the introduction of extrinsic evidence and argument about the unreliability of predictions of future dangerousness. If, for instance, it can be credibly argued that indeterminate detention exists primarily to placate public antipathy to sexual offenders and to current parole mechanisms, or to allow law enforcement officials to sidestep the interdiction against "gating" procedures, such motives may induce the courts to conclude that s. 688 is not demonstrably justifiable.

177. [1974] 1 W.W.R. 307 (B.C.C.A.)

178. Ibid, at 313.

179. (1980), 123 D.L.R. (3d) 369 (Ont. C.A.).

178. Ibid, at 381.

180. The possibility of this kind of detention for minor offences has long been the subject of debate. In the 1969 Report of the Canadian Committee on Corrections (the "Ouimet Report"), the committee noted (at 231):

> While it may be true that the criminal charge involved in the majority of cases of those acquitted on account of insanity...is classified as a serious one, this is not always the case. Lesser, and what many would feel are minor charges representing no danger have and may be involved.

Although the present **Code** provisions dealing with insanity would appear to have been enacted in response to such concerns, the potential fjor indefinite detention in cases of minor offences still exists, s. 542(1) notwithstanding. For example, s. 16(1) of the **Code** states that "no person shall be convicted of **an offence** in respect of an act or omission on his part while he was insane" (emphasis added). This section imposes a positive duty on all judges not to permit the conviction of a defendant or accused who may be insane. In addition, s. 737(1) states that, in summary conviction proceedings, a defendant is entitled "to make full answer and defence" aa provision which would include the defence of insanity.

182. The Fourtheenth Amendment reads in part: "...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

183. U.S. equal protection jurisprudence recognizes that legislation commonly distinguishes between one group of citizens and another. The courts' concern is that there be a "fit" between the distinction drawn and the purpose of the legislation. Currently, three standards are applied to classifications used in legislation. Certain distinctions, such as race, religion and nationality, are deemed inherently suspect and will be upheld only if for an "overriding state interest" which cannot be achieved by less prejudicial means. Under this "strict scrutiny" test, only one such suspect classification has ever been upheld: the detention of Japanese Americans during World War Two. "Intermediate scrutiny" is sometimes applied to distinctions based on sex and results in a finding of constitutionality only if the law is enacted for an "important governmental objective" and if there is a "substantial" relationship between such objective and the means used to realize it. Almost all other classifications are subject to "minimal scrutiny" under the "rational basis" test. Similar to the Canadian valid federal objective test, this standard of judicial scrutiny requires only that the courts find a reasonable relationship between the classification and the purpose of the law. ("The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective". McGowan v. Maryland, 366 U.S. 420 (1961) at 426).

184. See, e.g. U.S. v. Neary, 552 F 2d 1184 (7th Cir. 1977) and U.S. v. Inendino, 463 F. Supp. 252 (1978). Under the "rational basis" test, such legislation is constitutionally valid and within Fourteenth Amendment guarantees of due process and equal protection. Provided such statutes are strictly construed, and accuseds' procedural rights are observed, they have been upheld. The broad judicial discretion allowed in setting length of detention, the absence of a jury trial in some states, and the imprecise definition of dangerous offenders have not been found in violation of due process or equal protection.

Chapter 4

A CONSIDERATION OF POLICY OPTIONS

> I think that the indeterminancy has an adverse effect in that it removes hope - this is a personal feeling... It is difficult to say to a person - "You will be a 'whole person' but you are going to have to live in jail forever".
>
> (Member of Treatment Staff in a Canadian Penitentiary)

One of the most important issues to be addressed in any discussion of policy options for Dangerous Offenders is the detention of such offenders, not for their care or rehabilitation, but for the protection of the public. The public's protection is, in a sense, the primary goal of the criminal justice system. An additional goal exists, however, which is to protect offenders against excessive punishment for the conduct of which they have been convicted. Conciliation of these goals, in the theory that rehabilitation of offenders protects both society and the guilty upon discharge from incarceration, now appears unrealistic in practice, particularly where Dangerous Offenders are concerned. Such offenders and the community of their potential future victims appear as competitors for protective allegiance of the criminal justice and corrections systems.

Both the public and individual offenders have legitimate ethical claims upon those who determine and supervise sentences. Social interests and values are protected by macroethical insights, which recognize that individuals may be burdened for the collective benefit if they are equitably determined, for instance by reference to their individual past conduct and disposition. Microethical values require, however, that particular individuals not be offered for sacrifice upon an altar of public symbolism. A balance must be struck between duties to the public, and responsibilities to individual offenders. It must be enquired whether indeterminate sentencing of Dangerous Offenders under Part XXI strikes a fair and appropriate balance. An added burden of equity is that criminal process should be fair not only between prosecutor and defendant, but also between defendant and defendant.

The Dangerous Offender provisions have withstood criticisms that they are unethical, unfair, oppressive, and ineffective in achieving their avowed purpose, abused too easily as a tool in plea bargaining, and that they are based on a confidence in the ability of mental health professionals to predict individual future dangerousness over the long term, an ability which the professionals themselves deny they possess. The Law Reform Commission of Canada echoed the sentiments of many critics when it recommended in 1976 that Part XXI be abolished without replacement.[1] Popular and political support for the Commission's recommendation seemed to be lacking in the mid 1970's, however, and the present form of Part XXI was put into effect in 1977. It is prudent now to consider the criticisms associated with this latest Part XXI and to examine the options available for change in the context of present

perceptions and of policy objectives.[2]

Criticisms of the Current Part XXI

An alternative to further amending the Dangerous Offender provisions of the Criminal Code would simply be to retain the legislation as it stands now. Perhaps the strongest argument for this is that the provisions are so rarely used (32 successful applications over 6 years) that amendment is not necessary (see section 2:5 of Chapter 2). However, the criticisms of the provisions that have been made are so numerous and generally well-founded that even a cursory discussion of them reveals the scope of the flaws inherent in Part XXI and the need for reform.

Psychiatric Predictive Expertise is Limited

It has been argued that the major problem with Part XXI is that it is premised on the belief that dangerous behaviour can be predicted, presumably with some accuracy, by psychiatric experts. Such a prediction is essentially a present diagnosis that specific individuals will still be dangerous many years in the future when they would otherwise be released from prison. Psychiatrists currently face a crisis of credibility because of their growing recognition that they cannot predict, particularly over the long term, dangerous behaviour with any reasonable degree of certainty. In view of this, and in light of the implications of the Tarasoff case where the American Psychiatric Association in an amicus curiae brief disclaimed predictive expertise,[3] the Dangerous Offender provisions can be considered objectionable on two counts. First, from a procedural standpoint, if psychiatrists cannot distinguish with any more accuracy than lay persons potentially dangerous criminals from nondangerous ones, Part XXI ceases to be logically defensible. Second, from an ethical standpoint, it is highly questionable if the harshness of interderminate sentencing can be justified, even from a protectionist position, when it is based on a problematic capacity for prediction.

The Anti-Rehabilitative Effects of Indeterminate Sentencing

A great deal of the criticism directed at Part XXI has been focused on its provision for indeterminate sentencing. In addition to the ethical reservations stated above, many critics have noted the detrimental effects of indeterminate sentencing on prisoners. There is considerable evidence to suggest that the fully indeterminate sentence is basically destructive of rehabilitative objectives.[4] The effect of extended incarceration with very uncertain prospects for release and a long period of incarceration before release can even be contemplated has been known to cause a deterioration in the personality of the offender in the form of prison-induced psychosis.[5] This concern was reflected in the Model Sentencing Act[6] which rejected indeterminate sentencing because "a life term, even though subject to release, is a psychological set against any treatment other than the passage of time". This result is contrary to the often-repeated argument that an indeterminate sentence motivates the prisoner to reform himself. However, Britain's Advisory Council on the Penal System

reported in 1978 that the emotional trauma of the life prisoner, whose hopes for parole rise and fall time after time, is so serious that indeterminate sentences should be reserved for only the most exceptional cases.[7]

Stigmatization of the Prisoner

In addition to the undesirable direct effects associated with indeterminate incarceration there is a problem inherent in the creation of a special status such as that of the "Dangerous Offender". Offenders so labelled may become stigmatized.[8] Self-image may change as a result of the label, and the offender may adopt the external preception of himself associated with the Dangerous Offender designation. The effect of this may be to make the offender even more dangerous and less responsive to treatment.[9] Further, when the sexual offender carries the "dangerous" label with him into prison he becomes an even more inviting target for the aggression of other inmates. Many Canadian Dangerous Offenders require protective custody in prison.[10]

Use of the Dangerous Offender Provisions as a Too-Powerful Tool in Plea Bargaining

A further criticism made of the Dangerous Offender provisions is that they have been used and are still being used as an unfair tool by the prosecution in plea bargaining.[11] This disturbing possibility and, indeed, probability, has been noted by several critics who argue that the prosecution may bring to bear on an accused unethical and intolerable pressure to plead guilty by the threat that a Dangerous Offender application will be brought against him if he does not.

Inconsistent Applications of the Provisions

Another feature of the Dangerous Offender legislation that is clearly objectionable is that it is liable to be applied inconsistently. There are currently 32 Dangerous Offenders in Canada,[12] but while they have demonstrated violent behaviour and harmed others, so also have countless others who have escaped this special designation. No studies have yet been done to show that these 32 men were singled out because their behaviour had been demonstrably more violent, dangerous or repetitive than that of other aggressive criminals. Factors other than the labelled offenders' behaviour appear to be used in the process of designating one offender as more dangerous than another. One author has recently observed that the bulk of these post-1977 Dangerous Offenders have "distinguishing characteristics".[13] These characteristics include ethnicity, physical handicaps, bizarre deportment, obesity, epilepsy and mental retardation.

The suspicion that there may be inconsistent applications among offenders arises from the fact that, as noted previuosly in Section 2:5 of Chapter 2, there has been marked disparity in applications among different provinces. This could be due to the subjectively applied definitions of the legislation. Eighteen of 32 Dangerous Offenders were sentenced in Ontario. This suggests that factors such as community

sentiment or local sensitivity to a particular offence or offender, or the disposition of the particular Crown Attorney may determine if an application is brought. This may lead to the conclusion that a Dangerous Offender receives his status not only because of his behaviour or mental state, but also because of contingencies very much beyond his control. This conclusion gives added credence to the Ouimet Committee's conclusion that "legislation (such as the Dangerous Offender legislation) which is susceptible to such uneven application has no place in a rational system of correction".[14]

Treatment may be more Promised than Delivered

The Dangerous Offender provisions may imply that those detained under them will receive treatment which will eventually effect some measure of recovery, and that achievement of this rehabilitation will govern the time of their re-entrance into society. While indeterminate detention for the purpose of therapy and rehabilitation may be a desirable goal, on the model of medical or psychiatric treatment, the fact remains that a large number of offenders receive little or no treatment.[15] Their "therapy" takes the form of an indefinite and purely custodial confinement. Even where treatment is available, a perception among therapists exists that treatment should be postponed until a sufficient number of years has elapsed on an indeterminate sentence. Prison therapists tend to feel that any therapy before that is wasted, because the Parole Board will not consider an early release regardless of progress made through treatment.[16]

Difficulties of Treating Dangerous Offenders

Beyond the lack of treatment, and perhaps explaining it, there is a more basic difficulty. It is highly questionable whether any methods of therapy exist that have sizeable demonstrable effects on Dangerous Offenders, including sex offenders (see Section 2:6, Chapter 2). Even though the recent American study Psychiatry and Sex Psychopath Legislation[17] would not, on the basis of its title, seem directly relevant to the present Part XXI Dangerous Offender legislation, we see it as central to the present issues. Most of the present Canaadian Dangerous Offenders are sex offenders and the American Sex Psychopath legislation, like Part XXI, is distinguished by its powers to offer indeterminate sentences. The authors say:

> The categorization process projected by sexual psychopath statutes lacks clinical validity. The notion is naive and confusing that a hybrid amalgam of law and psychiatry can baldly label a person a "sex psychopath" or "sex offender" and then treat him in a manner consistent with a guarantee of community safety. The mere assumption that such a heterogeneous legal classification could define treatability and make people amenable to treatment is not only fallacious; it is startling. It is analogous to approaches that would create special categories of "burglary psychopath

> hospitals." The invalidity of this approach remains in the eighth decade of this century as it was in the third decade when sex psychopath statutes began to emerge. There are many discrete clinical problems involving sexual dysfunction or perversion which are capable of amelioration by selective treatment measures. These require individualized clinical assessment and treatment, which are not achieved by some generic mixing as sex offenders. Sex psychopathy is a questionable category from a legal standpoint and a meaningless grouping from a diagnostic and treatment standpoint.[18]

We would of course say that the above statements could be applied with equal force to our 'new' Canadian category of 'Dangerous Offender'.

It would seem that a major premise underlying indeterminate "therapeutic" confinement is that dangerous or violent crime is a symptom of a mental disease and that the habitual or dangerous offender is sick rather than bad and must be treated without time constraints until he is cured.[19] This premise is consistent with the view that psychiatrists must be involved in identification of such an offender. If one views criminal behaviour as the result of mental distress then psychiatric treatment would be the logical therapy for the offender. But if in fact there are many offenders who are not receiving treatment and many whom treatment will not help, then the Dangerous Offender provisions operate for purely punitive or protectionary purposes. And, as some authors have observed: "The conscious acknowledgement of the existence of the 'untreated dangerous', not to mention the 'untreatably dangerous', is surely a necessary first step in the development of the most rational and effective legislative and administrative response".[20]

4:2 Options

Procedural Changes

Revise the Language of Part XXI

The language of Part XXI is not as clear or unambiguous as it could be. The wording of the provisions invites subjective and inconsistent application and should be tightened so that it could never capture in its scope the persistent mere nuisance offender or the sexual deviant who is not truly "dangerous". The language should clarify the middle ground between the mere nuisance, and the offender whose behaviour has been so injurious that it will attract punishment of long incarceration in its own right.

As well, the descriptive terminology used in Part XXI, notable in words such as "aggressive", "indifference", "brutal" and "evil", invites prosecutors, judges and mental health professionals to assess penal sanctions on the basis of highly subjective and, perhaps, moral evaluations of the offender. To the extent that standards of morality or perceptions of, say, brutality vary from individual to individual and from

community to community, such language provides an unacceptable but virtually inevitable scope for what may appear to be arbitrarily disparate treatment of identical offenders and offences. If a judge deems sexual deviance "evil", for instance,[21] non-dangerous offenders who evince no intention to "control" their deviant sexual impulses in the future may be incarcerated indefinitely for their sexual preferences rather than their potential for violence. Similarly, in so far as certain types of repetitive behaviour which pose risks of serious injury to others - for example, drunken driving or domestic violence - have been more socially tolerated than phsyical assaults against strangers, the subjectively loaded terminology of Part XXI may allow prosecutors to adopt and reinforce objectively illogical cultural distinctions between the offender who habitually assaults women unknown to him and one who persistently assaults his own wife. The current language of s. 688 may well explain why there is such regional disparity in the number of Dangerous Offender applications brought by different provinces, and may undermine the principle that the criminal law should be applied uniformly across Canada. Although the wording of the section may not technically violate the forthcoming section of the Canadian Charter of Rights and Freedoms which guarantees equality before and under the law and equal protection of the law,[22] (s. 15) it appears to result in violating the principle of substantive equality in the judicial treatment of offenders.

Eliminate the Separate Categories in Part XXI

The distinction in the provisions between the Dangerous Offender and the Dangerous Sexual Offender may not be necessary, and may per se adversely affect the way Part XXI is applied. At present, the provisions are used almost exclusively for the sexual offender while seemingly almost ignoring the equally dangerous non-sexual offender. The distinction between the two drawn in the provisions encourages societal placement of the sexual offender in a different context from the "ordinary" offender (i.e., the sexual offender is seen to be even more deviant, objectionable and menacing than the highly aggressive but non-sex-offending counterpart). There is no logical basis for this. Moreover, it may be sounder psychiatrically to include the serious sex offender in the general group of offenders rather than in a separate category. Many offences which, from a legal standpoint are non-sexual, such as arson, assault and burglary with a view to theft, may have a sexual origin. The basic personality structure of a particular property burglar may resemble that of the rapist far more closely than that of the exhibitionist. Further, rape itself is increasingly being considered an act of violence through the medium of sex, rather than an act of sex through the medium of violence. Most importantly, the disposition and treatment of the sexual offender need not differ greatly from that of the general group.[23] Eliminating the distinction in the legislation might encourage more usage of the provisions for the non-sexual offender and would lessen unnecessary stigmatization of the sex offender.

Have a Jury Decide Dangerous Offender Applications

It may be argued that the present Dangerous Offender provisions place extraordinary and unnecessary power in the hands of the judge. This option would put that power in the hands of a jury who might be no less able to make an objective assessment and who could represent the community in identifying what constitutes dangerous conduct. Its role would be similar to that arising when there is a question raised concerning the sanity of an accused. When an insanity allegation is raised, a judge instructs the jury on the legal definition of insanity, and the jury decides as a matter of fact whether the accused meets the given criteria. If a jury is considered capable to find a defendant not guilty by reason of insanity, which results in indeterminate detention, it may be no less capable to find a defendant guilty by reason of dangerousness. In introducing a lay assessment, the jury would not necessarily be more lenient than a judge might be; indeed, having seen a victim giving evidence a jury might be more severe. A jury hearing would also function as a procedural safeguard for the alleged Dangerous Offender by providing lay assessment of professionals' claims to expertise. This affects the issue of whether the prosecution must show dangerousness beyond reasonable doubt, or only on a balance of probability, since the judge would have to instruct the jury on this issue.

Judicial Parole Review

One possible procedural change that might better serve the interests of fairness and natural justice would be to shift the decision-making power for releasing Dangerous Offenders who have served some time on their indeterminate sentence from a parole board to the courts. Any judgment on the release of a Dangerous Offender requires a fine balancing of competing values. The importance of protecting the public must be balanced with care against the need for accommodating the freedom and rights of the individual offender who has served the customary term for the convicted offence. Such a judgment is essentially a societal or political policy decision which may be better entrusted to courts than to the inappropriately influential advice of psychiatrists or social scientists whose instincts for self-defensiveness may weigh too strongly in the balance. The task of reconciling conflicts between freedom and authority is a paramount function of the courts. It should not be left to administrative bodies. The safeguards of judicial review, which may anticipate a need to defend decisions before the public, would give offenders greater procedural protection than a board of review could guarantee. Moreover, judges with an understanding of the value our legal system places on individual freedom would be perceived as being better able to reconcile protection of the public with restoration of liberty to those who have served conventional sentences for their offences.

More Frequent Review

Under the present legislation, a Dangerous Offender has the sentence reviewed once within the first three years and once every two years

thereafter.[24] It may be suggested that more frequent review, perhaps every year for example, would be preferable.[25] It is doubtful, however, that such a change would have a significant impact on the length of sentence served. There is a general understanding that Dangerous Offenders are not seriously considered for release until at least eight or nine years have been served. Reviews could be made more frequently, such as annually, after a designated period of time had already been served. Reviews might also remain compulsory every two years, but offenders might have the choice to request review one year after refusal of release. These options might encourage both therapists among the correctional staff and offenders to make serious and realistically timed attempts at rehabilitation, if rehabilitation is indeed possible.

Revise Provisions for Psychiatric Testimony

Part XXI of the Code provides that the Crown and the defence each shall call a psychiatrist to testify. There are two problems inherent in this provision. First, by compelling expert witnesses to appear as adversaries, objectivity may be lost and bias may be created. This polarization may induce imbalance or over-generalization in expert testimony. Second, and much more important, the problematic nature of long-range predictions of future violence is such that one must question if psychiatrists qualify as experts in this field.

This relates to the issue whether prediction of dangerousness is amenable to expertise at all, since key indicators seem to be individual past history,[26] and there is evidence that lay persons can interpret relevant data as well as professionals.[27] The Supreme Court of Canada has recently approved the observation that "An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary".[28]

The U.S. Supreme Court has just declined to follow the advice of a brief submitted by the American Psychiatric Association, arguing that psychiatrists not be allowed to testify as to a defendant's future dangerousness, and has found that such evidence should be admitted since the adversary system will take due account of any shortcomings it may reveal.[29]

The particular options that are available to remedy these problems regarding the role of psychiatric expert testimony include:

A) Eliminate psychiatric testimony from Dangerous Offender hearings[30] and have a prediction of future violence based on past behaviour only. This is consistent with the often-stated belief that the best predictor of future behaviour is past behaviour.

B) If psychiatric testimony is to be admitted, have a single, court-appointed psychiatrist act as an assessor to review all relevant information, and then submit any assessments or predictions to the court.[31] These predictions, if the psychiatrist chooses to make any,

should be of a very specific nature. If the psychiatrist predicts a likelihood of future violence, the prediction should state what types of violence and crimes are likely to be perpetrated and the probability of such crimes being committed, and exactly what the predictions are. In addition, the psychiatrist should be called upon to indicate whether, and to what extent, the offender's propensity for violence results from mental disorder requiring remediation through psychiatric or drug therapy. The object of such revision should be to avoid broad statements or predictions that could unfairly sway the court, and to reduce ambiguity as much as possible. It is also of considerable importance that the courts come to recognize the limits of the predictive value of psychiatric testimonies.[32]

C) Have Dangerous Offender applications decided by a tribunal composed of a judge and two-court appointed psychiatrists.[33] Again, this option has the benefit of removing psychiatrists from the front line of the adversarial process and would reduce confounding the issue with conflicting expert testimony. Lawyers for both sides would have access to psychiatrists to assist them in making submissions to the tribunal.

D) Allow parties to call psychiatrists if they wish, to serve not as experts but as the equivalent of character witnesses.

4:3 Substantive Changes

Extended Sentence Related to the Sentence that Might Otherwise have been Imposed

This option would provide for extended determinate sentences for those types of offenders thought to require longer periods of imprisonment that the maximum imposable upon the ordinary criminal.[34] The extended sentence would be ordered at the sentencing stage of the trial and would increase, according to a specified scale, the minimum and maximum penalties that could be imposed. Extended sentences would be applicable in cases of second or subsequent offences of either the same type or of different types. Proposals by the California Joint Legislative Committee for Revision of the Penal Code take this approach and set out specific criteria for the use of extended sentences.[35] This option avoids the undesirability of indeterminate sentences and is more likely to result in consistent application as it does not necessitate a psychiatric prediction of dangerousness. The Criminal Code already provides for escalating sentences for the repetition of certain offences,[36] so a specified scale of extended sentences for repeated "dangerous" or violent offences would not be inconsistent with existing sentencing jurisprudence.

A Special Term of Determinate Detention Unrelated to Possible Sentence[37]

This is an option recommended by the Model Sentencing Act[38] and the American Bar Association Project.[39] The object of this sentence is to detain persons with a history of dangerous criminal activities for periods of up to thirty years. As in the extended sentence option, specific statutory criteria would have to be met for the use of this exceptional sentence. Again this would avoid indeterminate detention and prediction

problems. However, as in the present legislation, the danger exists that it might not take into due consideration the reduced severity of the most recent offence that led to the application for special sentencing. To make such extended sentence obligatory may appear oppressive of minor offenders, and to make it discretionary may appear arbitrary.

Preventive Detention Imposed at the End of a Sentence

Under this option, on petition, a court may extend a sentence to a specified term where it finds that such extension is necessary for the protection of the public.[40] This type of finding by the court would be based on the offender's record both outside and within prison. A clear pattern of violent or sexually aggressive behaviour must be shown, and a substantial risk that the offender will in the future inflict death or severe injury on another person. A full hearing would be required, with all procedural safeguards that are afforded the ordinary defendant. Psychiatric testimony could be used as a supplementary requirement. A variation of this option is used in the Netherlands, where the extended sentence is indeterminate and subject to periodic review.[41]

Arguments against this option are that the ordering of an extended sentence after the original sentence has already been served may appear to be an arbitrary form of double jeopardy, and may have a harmful psychological effect on the offender. It is certainly debatable, however, if this is as damaging as a wholly indeterminate sentence. The advantages of the option are considerable. It avoids the "double stigmatization" of the present legislation and it keeps separate the considerations that apply to ordinary sentences from those that apply to preventive detention, thus reducing the likelihood that such sentences will be unjust or will be perceived as unjust. A system of preventive detention imposed at the end of a sentence is also less open to prosecutorial plea bargaining which has been a consistent source of complaint with the present legislation. Most importantly, this option allows for the identification of dangerous persons within the prison population while they are serving their sentences. There are many offenders who reveal their dangerousness in a prison setting and after imposition of sentence. It should be noted however, that the Law Reform Commission of Canada rejected this approach in arguing that Dangerous Offenders should be dealt with under normal sentencing law.[42] The Commission concluded that it is too difficult to predict how a man will behave on the street by assesssing his performance behind bars. Further, it may appear harsh to extend detention of an offender who responds to the brutalizing influence of incarceration. A practical objection that can be made against this option is that if misconduct or violent behaviour in prison is to be raised at the date of normal release at an application for an extended sentence, evidence may no longer be available. A better alternative may be to convict offenders immediately of crimes they commit while in prison, and sentence them to terms of imprisonment consecutive to those already being served.

Minimum Extended Sentence to be Followed by Judicial Review

This option takes into consideration many of the concerns already mentioned. It would provide for a determinate sentence to be added to the substantive sentence imposed. Once this sentence - possibly in the eight to ten year range - is served, the burden would be on the Crown to prove perhaps beyond reasonable doubt before an annual judicial review that the offender represents a continuing risk to society. This should take into account declining potential for violence and dangerousness related to advancing age.

Abolition of Part XXI

Accepting that there exists a need to amend the present legislation, the final option to consider is abolishing it and using the normal sentencing structure to deal with the so-called Dangerous Offenders. It can be argued that the Part XXI provisions are largely unnecessary because of the high maximum penalties available under the Criminal Code for many offences. This point was discussed in Section 2:5 of Chapter 2 where we noted that about half of the present Dangerous Offenders could have been given life sentences for the offence which prompted the hearing. The remainder would now be facing maximum terms of at least ten years. While it is true that under the normal sentencing structure the day would eventually come when these offenders would have to be released, they might then be civilly committed under Mental Health Act provision's dealing with dangerousness in other persons if necessary. Moreover there is strong evidence to suggest that dangerousness decreases with age.[43] What would be lost if the Dangerous Offender provisions were abolished without similar replacement is the function they serve as a powerful symbolic gesture[44] to an outraged community: a gesture of retributive justice.

If the Dangerous Offender provisions were abolished, one available tool that would aid the normal sentencing process in dealing with exceptional offenders is an administrative system which "flags" potential dangerous criminals. This system, known as PROMIS (Prosecutor Management Information System) identifies thorugh computer analysis of police records and other personal data those individuals whose records indicate violent and dangerous behaviour or a likelihood of future violent behaviour.[45] The object of the programme, which is currently being used in several parts of the United States and to a limited extent in some Canadian provinces, is to streamline and focus police and prosecutorial attention on 'dangerous' cases, in order to ensure that they are dealt with on a priority basis. Police, for instance, would be alerted to lay appropriately serious charges, and the Crown to abstain from plea bargaining. Further, the fact that a convicted offender conforms to a proven profile of dangerousness would be an issue to be addressed at sentence affecting, for instance, a choice between the ordering of concurrent or consecutive sentences. In addition to some kind of PROMIS programme, resources could be devoted to find methods of more accurately identifying those offenders who are likely to be dangerous. Such improved identification methods, in conjunction with priorizing the prosecution of dangerous offenders, might ensure that limited prison and mental health facilities are allocated to the detention of individuals most dangerous to

the public. This would be a long-term research option but, if successful, could form a better basis on which new legislation could be founded.

It must be emphasized that any of the above substantive changes proposed must be viewed in light of the current unreliability of future predictions of violence. Fixed extended sentences, for instance, may prove less psychologically damaging to those detained, and make them more amenable to successful therapeutic rehabilitation. However, if the inmate were incarcerated for 20 years, rather than "indefinitely" as the result of a false positive diagnosis, the injustice of the sentence would remain. Until mental health professionals or other "experts" can confidently and relatively accurately predict short and long term future dangerousness, options such as extending maximum determinate sentences or preventive detention imposed at the end of an offender's original sentence should be based on past criminal and/or violent behaviour, and not on speculations about future actions.

Chapter 4 - Footnotes

1. Law Reform Commission of Canada, see Chapter 1, note 19, supra.

2. Price and Gold, "Legal Controls for the Dangerous Offender" in Law Reform Commission of Canada, Studies on Imprisonment, (Ottawa: Queen's Printer, 1976) is, we think, a crucial document. In our discussion of policy options, we also draw somewhat on the material in Price and Gold's study for the Law Reform Commission. The options presented here are in many ways similar to those in the LRC Study Paper, not because of our unwillingness to consider other choices, but because the same issues are involved, and the same criticisms can be made of preventive detention and indeterminate sentence. Difficult technical problems are still to be resolved. Adequate procedural safeguards for potential Dangerous Offenders are still required. The exact nature of "dangerousness" has yet to be explicitly and narrowly defined. This last task, as Price and Gold have noted, is still, in essence,

> a political one which requires the striking of a balance between an offender's freedom and the protection of the community.... (at 206).

In 1983, we can perhaps, with additional empirical evidence and legal opinion, speak somewhat more forcefully to the positive and negative aspects of these policy alternatives.

3. See the American Psychiatric Association's amicus curiae brief in Tarasoff v. Regents of the University of California, 529 P.2d 553 (Sup. Ct. Alameda Co., 1974); 551 P.2d 334 (S.C. Cal., 1976).

4. Price and Gold, note 1, supra at 197. See also West, Roy and Nichols, Understanding Sexual Attacks (London: Heinemann, 1978) at 148-149.

5. Price and Gold, note 2, supra; but also see Rasch, "The Effects of Indeterminate Detention: A Study of Men Sentenced to Life Imprisonment" 4 Int. J. Law. Psychiat. 417 (1981). The author in a carefully conducted study of 53 men confined for life found no evidence for the development of psychotic symptoms as a result of extended incarceration. This finding which is contrary to a good deal of earlier evidence could, of course, be misinterpreted. The author is aware of this. His general conclusion which follows from a well executed piece of research (given the inherent difficulties of completing such scientific work on problems of this sort) is: "The rights or wrongs of imprisonment cannot be discussed with reference to its medical or psychological problems.... Whether in the future people will still be subjected to living in prison for indeterminate terms, under inhumane conditions, cannot be decided by experts because it is in essence an ethical question" (at 431).

6. National Council on Crime and Delinquency, Model Sentencing Act, s. 18.

7. Report of the Advisory Council on the Penal System, Sentences of Imprisonment: A Review of Maximum Penalties (Home Office, 1978) at 100-101.

8. See, for example, Sarbin, "The Dangerous Individual: An Outcome of Social Identificaiton Transformations" 7 Brit. J. Criminology 285 (1967). See also West, Roy and Nichols, note 4, supra.

9. Price and Gold, note 2, supra at 196.

10. Marcus, Nothing is my Number. (Toronto: General Publishing, 1971) at 16.

11. Klein, "Habitual Offender Legislation and the Bargaining Process", 15 Crim. L.Q. 417 at 429-430.

12. Berzins, "Use of Dangerous Offender Provisions from 1977 Inception to March 1983", Draft Report to the Ministry of the Solicitor General (1983) at 3.

13. Ibid.

14. Ouimet, Report of the Canadian Committee on Corrections; Toward Unity: Criminal Justice and Corrections. (Ottawa: Information Canada, 1969) at 253.

15. Greenland and McLeod, "Dangerous Sexual Offender Legislation 1948-1977: Misadventure in State Psychiatry". Paper presented at the Annual Meeting of the Canadian Psychiatric Association.

16. West, Roy and Nichols, supra, note 4 at 147-157.

17. Group for the Advancement of Psychiatry, 9 Psychiatry and Sex Psychopath Legislation: The 30's to the 80's (1977).

18. Ibid, at 935-936.

19. Schrieber, "Indeterminate Therapeutic Incarceration", 56 Virginia L.R. 602 at 624.

20. Price and Gold, note 2, supra at 186-187.

21. See R. v. Dwyer (1977), 34 C.C.C. (2d) 293 (Alta. S.C.) at 300. Mr. Justice Clement noted:

> Parliament has not seen fit to define "evil" and in construing the word for the purposes of s. 687 and s. 689 [now s. 688] a Court ought not by judicial pronouncements to narrow its scope and meaning beyond the necessities of the context in which it is used. The public interest looms large here. The sections have to do with sentencing, and by the very use of the words "preventive detention" in Part XXI of the Criminal Code in which the sections appear, the public interest primarily to be served is that aspect which gives weight to the protection of the public...
>
> In general understanding, when "evil" is used as a noun it usually connotes moral badness or depravity. In the

> context of the sections and the circumstances of the present case, I think it must be taken to mean evil consequent on the commission of any offence within the second category of the grouping in Klippert v. The Queen, particularly in so far as it involves young boys. It is not disputed that the offences on which Dwyer was convicted are evil in the general understanding.

22. See Chapter 3, Section 3:5, supra.

23. Our discussions with treatment staff at the RPC at Abbotsford and the RTC in Kingston Penitentiary incline us to think that workers there view their task as one of helping the men achieve a general improvement in social relationship. This is not to say that treatment of sexual difficulties per se does not remain a main focus of therapy. As one member of staff at Abbotsford said: "If you don't pay attention to sexual problems, they won't value your programme". But there is clear recognition that treatment limited to this domain is apt to be more or less fruitless.

24. Criminal Code, s.695.1(1).

25. Annual reviews as called for persons held under Warrants of the Lieutenant Governor might serve well (Criminal Code, s. 542(2)). It is worth noting that almost all of those in the Hillen-Webster Ad Hoc Consultation Study thought that the frequency of review should be increased to once per year. But see Chapter 2, note 204. The key problem is this matter is to get parole decisions aligned with assessment and treatment efforts. This point is dealt with in West et al, Note 4, supra. It was also brought out informally in our interviews with staff at Abbotsford and Kingston. One said: "We put a Dangerous Offender through our programme recently. It helped him a little. But now he's back in the general population. What's the point?.... So we teach them social skills, assertiveness training... What good are they for this?... There's no point in doing anything until they've got a minimum of five in - no one's going to look at them." Our point is that although an annual review might help, there is a serious risk that such reviews could become 'routine' and ineffective.

26. See Chapter 2 of this report, especially the text at notes 50 and 95-96.

27. See Tarasoff amicus curiae brief in note 2, supra; also Quinsey, "Prediction of Recidivism and the Evaluation of Treatment Programs for Sex Offenders", in Verdun-Jones and Keltner (eds.), Sexual Aggression and the Law, Criminology Research Centre, Simon Fraser University (1983) at 32.

28. R. v. Turner (1974), 60 Cr. App. R. 80 at 83 per Lawton L.J., cited in R. v. Abbey (1982), 138 D.L.R.(3d) 202 (S.C.C.) at 217.

29. Barefoot v. Estelle (U.S.S.C. No 82-6080, judgment delivered July 6, 1983).

30. In a searching review Dix has recently commented: "The evidence reviewed in this article clearly indicates that mental health prediction testimony is not based upon any demonstrated ability to predict specific types of conduct. Further, where such testimony involves persons who do not exhibit symptoms of traditional mental illness, there is little merit in the intuitive suggestion that because of their skills and experience in diagnosing and treating mental disorders, mental health professionals "must" have extraordinary abilities related to prediction. Perhaps the most serious danger is that of 'undue prejudice', the danger that triers of fact will give the testimony more weight than is due under an objective assessment of its probative value. Alternatively, the attractive manner of presentation by many forensic mental health practitioners may give rise to excessive reliance. It may also, however be due to an understandable but unfortunate human urge to seize uncritically upon proferred certainty in a difficult area characterized by questions with no apparent answers" (66 Virginia Law Review 523, 1980 at 573). With respect to fitness-to-stand-trial hearings, which of course hinge on psychiatric considerations, the Law Reform Commission of Canada has said: "Viva voce medical evidence will only be heard if the psychiatric report is contested. Oral medical testimony is time-consuming and expensive and should be avoided whenever possible. The thoroughness of the psychiatric report and distribution of the report to both counsel should lessen the abuse of medical testimony in this area", Mental Disorder in the Criminal Process. (Ottawa: Information Canada, 1976) at 20.

31. The merits of this scheme are carefully outlined by Needell. He says in part "... since a court-appointed expert will have no allegiance to a particular party, he or she will not feel compelled to maintain a particular view. Hence, he or she will be able to discuss dispassionately the possible theories that could explain the behavior at issue, even while advocating the theory he or she prefers". 6 Am. J. Law and Med. 425 (1980) at 443.

32. We completely endorse the idea of Dix when he says: "Qualification as ... an expert should require not only traditional mental health professional education and licensure but also training, experience, and a familiarity with the literature on prediction. It is likely that a major amount of improperly used testimony would never be admitted if prediction were recognized as a field of expertise separate from diagnosis and treatment of mental illness, and if stringent criteria for qualification as an expert in this area were imposed". Note 28, supra at 575.

33. The idea of a 'psychiatric jury' is considered by Needell, note 30, supra at 435.

34. Price and Gold, note 2, supra at 199. This was discussed in some detail with respect to the Berzins Draft Report in Chapter 2, text accompanying notes 126-127.

35. California Joint Legislative Committee for Revision of the Penal Code, Penal Revision Project (Text Draft No. 2, 1968).

36. See, for example, s. 186(2), s. 234(1) and (2), s. 235(2), s. 236(1) and s. 236.7.

37. Price and Gold, note 2, supra at 201.

38. See note 5, supra.

39. American Bar Association Project, Sentencing Alternatives and Procedures.

40. Price and Gold, note 2, supra at 201.

41. See Netherlands Prison Service, Detention at the Government's Pleasure: Treatment of Criminal Psychopaths in the Netherlands (n.d.).

42. Law Reform Commission of Canada, note 1, supra.

43. Monahan (in Predicting Violent Behavior: An Assessment of Clinical Techniques (California: Sage, 1981)) summarizes the evidence on this. He notes: "As violence feeds on the energy of youth, so age mellows even the most habitual offender" (at 106).

44. See Petrunik, "The Politics of Dangerousness" 5 Int'l. J. Law and Psychiat. 225 (1982) at 246. The Psychiatry and Sex Psychopath Legislation report notes (at 941): "... sex psychopath statutes originated in situations of community and legislative pressure. Along with adverse consequences to the individual, there is the handicap a society labors under in deceiving itself that something worthwhile and effective is being done. In the end, the integrity of everyone is compromised." Note 17, supra.

45. See Chapter 2, note 102, supra.

E.H. 27-11-87